(13)

No. 87-505-CFX
Status: GRANTED

Title: Chick Kam Choo, et al., Petitioners
v.
Exxon Corporation, et al.

Docketed:
September 21, 1987

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Musslewhite,Benton

Counsel for respondent: Cooney,James Patrick

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1987	G	Petition for writ of certiorari filed.
2	Oct 28 1987		DISTRIBUTED. November 13, 1987
3	Oct 29 1987	X	Brief of respondents in opposition filed.
4	Nov 16 1987		Petition GRANTED.
			**********
5	Dec 16 1987		Record filed.
		*	Certified copy of original record and C.A. proceedings, volumes, received.
7	Dec 18 1987		Order extending time to file brief of petitioner on the merits until January 11, 1988.
8	Jan 11 1988		Brief of petitioners Chick Kam Choo, et al. filed.
9	Jan 11 1988		Joint appendix filed.
11	Feb 1 1988		Order extending time to file brief of respondent on the merits until February 20, 1988.
12	Feb 5 1988		SET FOR ARGUMENT. Wednesday, March 30, 1988. (3rd case).
14	Feb 19 1988		Brief amici curiae of McClelland Engineers, Inc., et al. filed.
16	Feb 19 1988		Brief amicus curiae of Maritime Law Assn. of the U.S. filed.
17	Feb 19 1988		Brief amicus curiae of Shell Oil Company filed.
19	Feb 19 1988		Brief amicus curiae of Crowley Maritime Corp. filed.
13	Feb 20 1988		Brief amicus curiae of International Chamber of Shipping filed.
15	Feb 20 1988		Brief of respondents Exxon Corporation, et al. filed.
18	Feb 20 1988		Brief amici curiae of Internatl. Assoc. of Drilling Contractors, et al. filed.
20	Mar 1 1988		CIRCULATED.
21	Mar 21 1988	X	Reply brief of petitioners Chick Choo, et al. filed.
22	Mar 30 1988		ARGUED.

87-505

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

***

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

***

CHICK KAM CHOO, Et Al.,
Petitioners,

versus

EXXON CORPORATION, Et Al.,
Respondents.

(In the Court of Appeals Exxon Corporation, Et Al. vs. Chick Kam Choo, Et Al.)

***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002

Joseph C. Blanks
909 Laurel
Beaumont, Texas 77701

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Supreme Court should grant certiorari in order to achieve a uniformity of decisions among the courts of appeals by resolving a recently created conflict between the Fifth and Ninth Circuits, the Fifth Circuit holding in **Exxon Corporation vs. Chick Kam Choo**, 817 F.2d 307 (5 Cir. 1987) that where a federal court has previously dismissed a maritime case on grounds of forum non conveniens and the same case is subsequently filed in a state court, such federal court can, despite the terms and provisions of the Anti-Injunction Statute, 28 U.S.C. 2283, issue an injunction against the state court proceeding, while the Ninth Circuit, in the case of **Zipfel v. Halliburton Co., et al.**, 820 F.2d. 1438

9 Cir. 1987), has held directly to the contrary?

II.

Whether the Supreme Court should grant writ of certiorari to resolve the conflict between the decision below - ***Exxon Corporation vs. Chick Kam Choo, supra***, holding that, under the doctrine of federal maritime law preemption, a federal court may enjoin a state court from deciding the forum non conveniens issue under state law in a maritime case filed in state court - and the decisions of this Court such as **Atlantic Coast Line v. Brotherhood of Railway Workers,** 398 U.S. 281 (1970); **Amalgamated Clothing v. Richman Brothers,** 348 U.S. 511 (1954); **Mitchum v. Foster,** 407 U.S. 225 (1972); and **Vendo Co. v. Lektro Vend Corp.,** 433 U.S. 623 (1977), holding that even where the question before a

state court involves an area preempted by federal law, the Anti-Injunction Statute still prohibits a federal court from enjoining the state court action?

III

Whether the Supreme Court should grant writ of certiorari to resolve the important question of whether, in a 28 U.S.C. 2283 injunction case, a forum non conveniens dismissal in the federal court can ever act as res judicata with respect to a forum non conveniens determination by a state court in the same case, particularly where the applicable state law does not recognize the doctrine of forum non conveniens or utilizes criteria different from those employed by the federal courts or the facts applicable to such determinations are in some way different?

IV.

Whether this Court should grant writ of certiorari to resolve the important question of whether or not, after a party has removed a state court case to federal court and the case has been ordered remanded, such party can later secure an injunction prohibiting the state court from proceeding in the same case, despite the provisions of the Anti-Injunction Statute, 28 U.S.C. 2283?

V.

Whether the Supreme Court should grant writ of certiorari to clarify important questions dealing with the underlying policies of 28 U.S.C. 2283 and of equity, comity, federalism and abstention, particularly as they relate to a federal court's interference with state court proceedings in a case that has previously been dismissed in the federal court on grounds of forum non conveniens?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND IN THE COURT OF APPEALS

The Petitioners are:

Chick Kam Choo, Individually and as Administratrix and/or Representative of the Etate of Leong Chong, Deceased, and as Next Fried of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Tan, Benton Musslewhite and Joseph C. Blanks.

The Respondents are:

Exxon Corporation
and
Esso Tankers, Inc.

TABLE OF CONTENTS

Questions Presented for Review.....	i
List of All Parties.....	
Table of Contents.....	vii
Index of Authorities.....	xi
Reference to Official and Unofficial Reports of Opinions Delivered by the Courts Below.....	1
Grounds Upon Which the Jurisdiction of the Supreme Court is Invoked...	1
Constitutional Provisions, Statutes and Rules Which this Case Involves.....	2
Statement of the Case.....	2
Reasons for Granting Petition for Writ of Certiorari:	
I. This Court Should Resolve the Conflict Between the Decision of the Court Below and the *Zipfel* Decision of the Ninth Circuit.....	9

II.
Certiorari Should be Granted Because the Decision of the Majority In *Choo*, Holding that Federal Maritime Law Principles Preempts a State Court from Deciding the Issue of Forum Non Conveniens In a Case Before it on the Basis of State Law, is in Direct Conflict with a Number of Supreme Court Cases as Hereinafter Discussed..... 22

III.
Certiorari Intervention Is Also Proper, We Respectfully Suggest, Because the Fifth Circuit's Decision Runs Counter to Previous Supreme Court Authority Holding that Forum Non Conveniens Determinations are Procedural and Do Not Constitute Res Judicata..... 31

IV.
Another Reason The Court Should Grant Certiorari is to Rule Upon the Question of Whether or not a Defendant Who Has Been Unsuccessful in an Attempt to Remove a State Court Action Under the Removal Statutes Can Thereafter Rely Upon the Anti-Injunction Statute for the Purposes of Securing an Injunction by the Federal Court Against Those Same State Court Proceedings.... 47

V.
Lastly, This Court Should Grant Certiorari in Order to Reaffirm the Sacred Principles of Federalism, Equity, Comity and Abstention..... 51

Prayer..... 58

Certificate of Service..... 59

INDEX OF AUTHORITIES

Aboujdid v. Gulf Aviation Co., 108 Misc.2d 175, 437 N.Y.Supp.2d 219, aff'd 448 N.Y.Supp.2d 427 (1st App. 1982)..... 40

Allen v. Bass, 47 S.W.2d 426 (Tex.App.-El Paso 1932).... 15

Alton Box Board v. Espirit de Corp., 682 F.2d 1267 (9 Cir. 1982)..... 27

Amalgamated Clothing v. Richman Bros., 348 U.S. 511 (1954)..... ii, 12, 25, 29, 30, 46, 47

American Fire and Casualty Co. v. Finn, 341 U.S. 6 (1957)..... 49

Askew v. American Waterways Operators, 411 U.S. 325 (1972)..... 45

Atlantic Coastline v. Brotherhood of Ry Wkrs, 398 U.S. 281 (1970)..... ii, 10, 17 26, 29, 30

Boskoff v. Boeing Co., 16 Aviation Law Rptrs. 17, 753 (Sup.Ct.N.Y. 1981)..... 40

Domingo v. States Marine Lines, 340 F.Supp. 811 (S.D.N.Y. 1972)..... 38

Exxon Corp. v. Chick Kam Choo, 699 F.2d 693 (5 Cir. 1983)..... 3

Exxon Corp. v. Chick Kam Choo, 764 F.2d 1148 (5 Cir. 1985)..... 4

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5 Cir. 1987)..... i, ii, 1 passim

Garrett v. Moore-McCormick, 317 U.S. 239 (1942)..... 45

Grant-Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922)..... 45

International Machinists and Aerospace Workers v. Nix, 512 F.2d 125 (5 cir. 1975). 39

Kahn v. United Technologies Corp., 16 Aviation Cases, 17, 651 Conn. (Sup.Ct. 1981)... 40

Lamb International v. Kiroff, 549 F.2d 1052 (6 Cir. 1977)..... 39

Landi v. Phelps, 740 F.2d 710 (9 Cir. 1984)..... 28

LeCroy v. Hamlon, 713 F.2d 335 (Tex. 1986)..... 15

Lumbert Run Coal Co. v. Baltimore & Ohio Ry. Co., 258 U.S. 377 (1922)..... 49

Missouri v. Mayfield, 340 U.S. 1 (1950)..... 24, 36, 38 43, 46

Mitchum v. Foster, 407 U.S. 225 (1972)..... ii, 17, 29 30, 52

Mizokami Bros. v. Mobay Chemical Corp., 660 F.2d 712 (6 Cir. 1981)..... 38

N.L.R.B. v. North-Finch Co., 434 U.S. 971 (8 Cir. 1970). 27

Norfolk & Western Ry Co. v. Beatty, 400 F.Supp. 234 (S.D.Ill. 1975), aff'd 96 S.Ct. 439 (1976)..... 38, 46

Offshore Logistics v. Tallentire, 91 L.Ed.2d 174 (1986)..... 23, 45

Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 371 (1963)..... 24, 33, 35 36, 38, 43

Pennzoil v. Texaco, 107 S.Ct. 1519 (1987)..... 15, 24, 57

Prack v. Wiesinger, 276 F.2d 446 (4 Cir.1960)..... 40, 43

Roth v. Bank of Commonwealth, 583 F.2d 527 (6 Cir. 1977)..... 39

Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11 Cir. 1981)..... 46

Southern California v. Harper, 273 F.2d 705 (5 Cir. 1960)..... 50, 51, 57

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5 Cir. 1977)..... 39

Vendo Co. v. Lektro Vend Corp., 433 U.S. 623 (1977). ii, 11, 29

Wilburn Boat co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1965)... 45

Zipfel v. Halliburton Co., 820 F.2d 1438 (9 Cir. 1987)..... i, 7, 8, 12, passim

STATUTES

23 U.S.C. 1254(1)..... 2

28 U.S.C. 1404(a)..... 33, 34

28 U.S.C. 2283..... 2, 5, 7 passim

29 U.S.C. 158..... 25

46 U.S.C. 688..... 2, 23

46 U.S.C. 761..... 2

Texas Civil Practice and Remedies Code, Sect. 71.031..... 6, 13

Article 1, Sect. 13, Texas Constitution..... 15

Other Authorities

Wright and Miller, *Injunction Against State*, Sect. 4226.. 38

18 C.Wright, A.Miller & E. Cooper, *Federal Practice and Procedure*, Sec. 4426..... 52

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court dated May 15, 1986 granting an injunction against proceedings in the state district court of Harris County, Texas, involving the same matter. (Appendix I).

2. The opinion of the Court of Appeals in ***Exxon Corporation vs. Chick Kam Choo***, 817 F.2d 307 (5 Cir. 1987), affirming the district court's grant of injunction against the state court proceedings. (Appendix II).

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered May 21, 1987. The petition for rehearing and rehearing en banc was timely filed and overruled on June 24, 1987. This petition for writ

of certiorari was timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case primarily involves construction and application of 28 U.S.C. 2283, the Anti-Injunction Statute.

STATEMENT OF THE CASE

Suit was initially filed in the federal district court of Houston, Texas, alleging causes of action under the Jones Act, 46 U.S.C. 688; the Death on the High Seas Act (DOHSA), 46 U.S.C. 761, et seq.; the general maritime law; and under state law for the wrongful death of Leon Chang, which occurred

while he was working on board a blue-water vessel owned and operated by an Exxon subsidiary based in the United States. The vessel in question flew a flag of convenience, with the beneficial flag state being the United States.

The federal district court dismissed the case, holding that Chang was not a Jones Act seaman, DOHSA was inapplicable because the accident occurred within the territorial waters of Singapore and that the other claims should be dismissed on grounds of forum non conveniens. The district court's dismissals were affirmed by the Court of Appeals, Fifth Circuit, 699 F.2d 693 (5 Cir. 1983), cert den., 464 U.S. 826. (*"Choo I"*).

Thereafter, Madam Choo filed suit on the same basic claims in the state court and Exxon immediately removed on grounds of diversity of citizenship to the

federal district court. Though Madam Choo filed a motion to remand, the district court, Black, J., denied the motion, dismissed on grounds of res judicata and imposed sanctions. On appeal, the Court of Appeals reversed, holding that the motion to remand should have been granted because of the presence of aliens on both sides of the docket. 764 F.2d 1148 (5 Cir. 1985)("Choo II").

Immediately after the Fifth Circuit issued its mandate in Choo II, Exxon filed an original action in the United States District Court for the Southern District of Texas, Houston Division, and again was assigned to Judge Black. Exxon requested Judge Black to grant a permanent injunction enjoining Madam Choo from proceeding in the state court or in any other court in the United

States. Madam Choo opposed the request, asserting lack of jurisdiction, the bar of 28 U.S.C. 2283 and that the injunction was inappropriate under principles of equity, comity, federalism and abstention. At the hearing on Exxon's request for an injunction, Exxon did not offer any testimony or ***any other evidence*** to prove identicality of objective facts as between the federal and state forum non conveniens laws or to prove that Exxon had no adequate remedy at law because of some inability on the part of the state court to handle issues of direct estoppel, res judicata and forum non conveniens. The federal district court nevertheless summarily granted a permanent injunction and again sanctioned Madam Choo and her lawyers.

After Madam Choo appealed, the Court of Appeals, per Judge Gee - though

conceding that the forum non conveniens dismissal by the federal court did not directly estop the state court from denying a forum non conveniens motion because, under Section 71.031 of Texas' Civil Practice and Remedies Code (Texas' "open forum law"), the Supreme Court of Texas would probably hold that dismissals on such grounds are never permitted - nevertheless held that because the decedent was involved in a maritime accident the state court was preempted from deciding the forum non conveniens issue any way but as decided by the federal district court. 817 F.2d at 324, 325. Judge Clark concurred in the result but based his concurrence on the fact that the federal forum non conveniens ruling barred "relitigation" of that issue by the state court, within the meaning of the relitigation

exception of 28 U.S.C. 2283. Judge Clark did state that, in order to achieve a majority result, he would secondarily agree that federal maritime law preempted the state court from determining the forum non conveniens issue contrary to federal forum non conveniens law. 817 F.2d at 325. Judge Reavley dissented, holding that the state court should be left to decide the forum non conveniens issue under state law, without interference by the federal court, all as mandated by the Anti-Injunction Statute, 28 U.S.C. 2283. id. at 325, 326.

In the meantime, in another maritime case, ***Zipfel v. Halliburton Co., et al.***, 820 F.2d 1438 (9 Cir. 1987), mtn. for reh. pending, a unanimous panel of the Court of Appeals for the Ninth Circuit held directly contrary to the Fifth

Circuit in this case. The Ninth Circuit held that the Anti-Injunction Statute, 28 U.S.C. 2283, prohibits a federal court, which has dimissed a maritime case on grounds of forum non conveniens, from later enjoining a state court from proceeding in the same case.

Because of the direct conflict between these two recent decisions, the decision of the Fifth Circuit in this case, and the decision of the Ninth Circuit in *Zipfel*, and because of the conflict the court below has generated - in holding that the doctrine of preemption can be used to authorize a federal court to enjoin a state court action - with the Supreme Court decisions mentioned in the "Questions Presented for Review", and for other reasons stated in the "Questions Presented for Review", the petitioners

seek Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I.

This Court Should Resolve The Conflict Between The Decision Of The Court Below And The *Zipfel* Decision Of The Ninth Circuit.

This case involves a number of issues which are of considerable public importance. These include, among others, federalism, abstention, comity, states rights, maritime policy, preemption, the Anti-Injunction Statute, res judicata, removal and remand statutes, federal jurisdiction, forum non conveniens and, at the very foundation of our federal republic, the judicial relationship between the federal and state courts.

Congress, in order to reinforce the constitutional principles of federalism,

enacted the so-called Anti-Injunction Statute, 28 U.S.C. 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The landmark case involving the Anti-Injunction Statute is this Court's decision in ***Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers***, 398 U.S. 281 (1970). In that case this Court defined the scope of the Statute, stating that it is an "absolute prohibition against enjoining state court proceedings, **unless the injunction falls within one of three specifically defined exceptions**"; that the statute "is not a statute conveying a broad general policy for appropriate *ad hoc* application"; that, first, it must be determined that the injunction is

"proper under general equitable principles" and, if it is, it must then be clearly shown that it is "based on one of the specific statutory exceptions to 28 U.S.C. 2283"; that the exceptions "should not be enlarged by loose statutory construction"; and that therefore, as Judge Reavley observed in his dissent in this case, "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S. at 286, 287, 297; emphasis ours. This Court has confirmed such principles of statutory federalism in other decisions, including Chief Justice Rehnquist's opinion in ***Vendo Company v. Lektro Vend Corp.***, 423 U.S. 623 (1977). See also, ***Amalgamated***

Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1954); and *Mitchum v. Foster*, 407 U.S. 225 (1972).

With the foregoing principles in mind, we shall now examine the two conflicting decisions, the decision of the Fifth Circuit in this case and of the Ninth Circuit in *Zipfel*. In the Fifth Circuit decision, the judge who wrote the majority opinion, Judge Gee, strangely without mentioning the Anti-Injunction Statute, concluded that, generally speaking, where a federal district court dismisses a case on grounds of forum non conveniens and the same case is filed in a state court, the federal court forum non conveniens dismissal precludes the state court from reconsidering the forum non conveniens issue unless "objective facts relevant to the issue that materially alter the considerations

underlying the previous resolution" are shown. 817 F.2d at 311-314. Although Judge Gee improperly assumed - in the face of Exxon's failure to offer any evidence to that effect in the federal district court - that the objective facts underlying the federal and Texas state court's resolution of that issue would ordinarily be the same, he conceded that Texas has a "peculiarity" in its law, namely its open forum statute, Sect. 71.031 of the Civil Practice and Remedies Code,[1] the effect

---

1. Sect. 71.031 provides:

> (a) An Action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a

of which Judge Gee discusses:

> Madam Choo contends that the existence of Section 71.031 precludes *forum non conveniens* analysis in a personal injury or death case filed in a Texas state court; and, given the broad hints thus far dropped by the Texas Supreme Court, it is hard to disagree that this may be its view of the statute. From this premise, she concludes that a *forum non conveniens* dismissal of such an

---

fn.1 cont.

> right to maintain an action for damages for the death or injury;
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

> action by a federal court cannot be *res judicata* in a Texas state court because Section 71.031 creates a potentially dispositive legal issue that has not yet been fully and finally litigated between the parties. Again, as a general matter, we can find no fault with her logic: When a federal court and a Texas state court have concurrent and *independent* jurisdiction over a personal injury or death action, in the end Section 71.031 may well be construed by the Texas Supreme Court to preclude direct estoppel in the state courts by a *forum non conveniens* dismissal in the federal courts.

817 F.2d at 316.[2]

But, Judge Gee reasons, because this case is a "maritime case", the state

---

2. This view of Texas law seems consistent with Article 1, Sect. 13 of the Texas Constitution, commonly referred to as Texas' "open courts" provision. See ***LeCroy v. Hanlon***, 713 S.W.2d 335, 340-341 (Tex.1986) and ***Nelson v. Krusen***, 678 S.W.2d 918, 921 (Tex. 1984). This Court in ***Pennzoil v. Texaco***, 107 S.Ct. 1519 (1987) has recognized and discussed Texas' open courts provision in some detail. ***id.*** at 1526, 1528. Also, in addition to the authorities discussed by Judge Gee, 807 F.2d at 314-16, see ***Allen v. Bass***, 47 S.W.2d 426 (Tex.App.-El Paso 1932, writ ref'd)(discussing Art. 4678, R.C.S., the predecessor to Sec. 71.031).

court's jurisdiction is derivative and it is bound to apply the general maritime law of the United States, including federal forum non conveniens law. 817 F.2d at 316-325. As can be seen, this conclusion was reached by Judge Gee through a tortuous process of reasoning and without one word of discussion of whether or not the Anti-Injunction Act would permit an injunction based upon the doctrine of "preemption". *id.* Judge Clark, though concurring in the result, was more wrong than Judge Gee and argued that the invocation of the doctrine of preemption was unnecessary because the forum non conveniens decision by the federal court was res judicata of a later such determination by the state court. 817 F.2d at 325. Judge Reavley, in a short but strong dissent, incisively implied

that the doctrine of preemption was not one of the exceptions expressly included within the Anti-Injunction Statute and, therefore, pursuant to the mandate of ***Atlantic Coastline Railroad Co.***, "any doubts as to the propriety of a federal injunction of a state court proceeding should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controvesy." 817 F.2d at 325, 326. He squarely held that the injunction issued by the federal district court in this case should have been reversed and dissolved and his position is completely consistent with the decision of the Ninth Circuit in ***Zipfel***.

Clearly, as we stated above, the ***Zipfel*** decision, as is Judge Reavley's dissent, is in direct conflict with the

majority opinion in ***Choo III*** by the Fifth Circuit. In ***Zipfel***, another maritime case, the foreign plaintiffs filed suits simultaneously in the state court of Texas and in the federal district court in California. The federal district court dismissed the foreign plaintiffs' cases on grounds of forum non conveniens and they then activated their cases in the state court of Texas. The federal district court in California then granted a permanent injunction, enjoining the Texas state court from proceeding and the foreign plaintiffs appealed. The Ninth Circuit reversed the grant of the injunction against the state court proceeding and in so doing stated:

> The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The

second exception applies to the American seaman's lawsuit, because, under our holding in this case, the district court will retain jurisdiction over that lawsuit. *See Alton Box*, 682 F.2d at 1271. This exception does not apply, however, to the foreign seamen's lawsuits because the district court no longer has jurisdiction over those suits. *Id.* The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seamen's cases. At that point there was no need for an injunction to protect the district court's jurisdiction. *Id.*

The third exception to the Anti-Injunction Act similarly does not support the district court's injunction. This court has held that a district court may grant an injunction to protect the *res judicata* effect of its judgment "where the federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Golden*, 786 F.2d at 1427. Defendants argue that a determination on the merits is not required for an injunction against state court actions when a district court has dismissed a lawsuit for *forum non conveniens* arising in the same matters. The wording of our cases, however, is explicit, and refers to decisions on the merits. *See Golden*, 786 F.2d at 1427; *Midkiff v. Tom*, 725

> F.2d 502, 504 (9 Cir. 1984). Here, defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuit in a United States district court. No judgment on the merits has been rendered. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

820 F.2d at 1449.

In view of the above elucidated clear conflict between the unanimous decision of the Ninth Circuit in ***Zipfel*** and the majority decision of the Fifth Circuit in ***Choo***, this Court should grant writ of certiorari in this case so that it can resolve the conflict and maintain a uniformity of decisions in the courts of appeals. Moreover, the importance of the issues involved in the resolution of such conflict - such as those pertaining to federalism, comity, abstention and non-interference by the federal courts

in state court actions - magnify the need for this Court's intervention. Indeed, the implications of the conflicting rationale of these two decisions extends in scope not only to forum non conveniens determinations but to all decisions which are not final upon the merits. Thus the question is squarely presented as to whether the "relitigation" exception in 28 U.S.C. 2283 pertains ***only*** to decisions upon the merits, as was held by the Ninth Circuit, or does it permit the use of injunctions against state court interlocutory and procedural actions, which are not final decisions upon the merits of the case. Because the number of situations wherein procedural decisions might become involved in efforts to secure injunctions against state court actions are so numerous and

vast, it is essential, we suggest, for this Court to intervene and clarify just what the scope of the "relitigation exception" is within the context of forum non conveniens and other procedural determinations.

II.

Certiorari Should Be Granted Because The Decision Of the Majority In *Choo*, Holding That Federal Maritime Law Preempts A State Court From Deciding The Issue Of Forum Non Conveniens In A Case Before It On The Basis Of State Law, Is In Direct Conflict With A Number Of Supreme Court Cases As Hereinafter Discussed.

One of the most disconcerting things about Judge Gee's elaborate opinion in *Choo* is that he discusses preemption without *ever* pausing to mention, ***even in one sentence***, the Anti-Injunction Statute and its relationship to the doctrine of preemption. Judge Reavley, in his dissent, went right to the heart of the matter and dissented because,

obviously, "federal preemption" is *not* one of the exceptions expressly named in the Anti- Injunction Statute.

This issue is extremely important because a logical analysis of what Judge Gee is saying is ominous. His rationale will apply not only in cases involving injunctions under the Anti-Injunction Statute, but, if allowed to stand, it will affect *any* case in which a maritime plaintiff files suit in state court, as he certainly is allowed to do under the Jones Act, 46 U.S.C. 688, and presumably under the general maritime law, **see Offshore Logistics v. Tallentire**, 91 L.Ed.2d 174 (1986), and, if a forum non conveniens motion should be presented in any such case, the state court would be forced to apply federal forum non conveniens principles in deciding such motion. Such a broad and

sweeping extension of the doctrine of preemption would seem to fly directly in the face of **Parsons v. Chesapeake & Ohio Rwy. Co.**, 375 U.S. 371 (1963) and **Missouri v. Mayfield**, 340 U.S. 1 (1950). In those two cases, this Court made it clear that forum non conveniens determinations are basically procedural matters which each court, whether it be state or federal, must decide in accordance with its own law. See further discussion of these cases, *infra*.

In any event, as to whether or not a federal court may resort to the doctrine of federal preemption in order to issue an injunction against a state court proceeding, candidly it is very shocking to us that Judge Gee utilized such doctrine ***without ever mentioning the cases of this Court in which it has been***

expressly mandated that the doctrine of preemption could not be so utilized.

In ***Amalgamated Clothing***, this Court discussed this question in depth, 99 L.Ed. at 607-610. In that case the proponents of the federal injunction contended that the state court's consideration of the same case was preempted by the Taft Hartley Act, 29 U.S.C. 158. This Court's response was as follows:

> In the face of this carefully considered enactment, we cannot accept the argument of petitioner and the Board, as amicus curiae, that Sec. 2283 does not apply whenever the moving party in the District Court alleges that the state court is "wholly without jurisdiction over the subject matter, *having invaded a field preempted by Congress.*" **No such exception had been established by judicial decision under former Sec. 265. In any event, Congress has left no justification for its recognition now.** This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified

only by specifically defined exceptions.

99 L.Ed.at 607-608; emphasis ours. This Court and many circuit courts have expressly reaffirmed the above. See *Atlantic Coast Line*, 398 U.S. at 254 ("A federal court does not have inherent power to ignore the limitations of Sec. 2283 and to enjoin state court proceedings *merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear*"); *Mitchum v. Foster*, 407 U.S. at 636-639 ("... the prohibitions of Sec. 2283 exist separate and apart from those traditional principles [of preemption in the anti-trust field] and we cannot read the 'intended scope' language *as rendering this specific and long-stand-*

ing statutory provision inoperative simply because important federal policies are fostered by the [anti-trust] statute under which the injunction is sought .... Given the clear prohibition of Sec. 2283, *the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying Sec. 2283; by the statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself*"); **T. Smith & Sons, Inc. v. Williams**, 275 F.2d 397, 407 (5 Cir. 1960); **N.L.R.B. v. North-Finch Co.**, 434 F.2d 971, 975-976 (8 Cir. 1970); **N.L.R.B. v. Swift & Co.**, 233 F.2d 226 (8 Cir. 1956); **Alton Box Board v. Espirit de Corp**, 682 F.2d 1267, 1273 (9 Cir.

1982); and **Landi v. Phelps**, 740 F.2d 710, 713 (9 Cir. 1984).

The rationale which emerges from these decisions is that if 28 U.S.C. 2283 is to be obviated by preemption notions it can only be done through the "expressly authorized" exception, which of course *must involve a statute* which expressly authorizes an injunction. In the first place, as Judge Gee conceded, 817 F.2d at 320, maritime forum non conveniens is a common law doctrine, not involving a statute, and there is nothing in the Jones Act or DOHSA that even hints at express authorization of an injunction against state court proceedings. As reasoned by Chief Justice Rehnquist, if Congress had wanted the federal courts to have the power to enjoin a state court with regard to a particular federal policy

area it would have expressly so authorized it in a statute. ***Vendo Co.***, 433 U.S. at 639. Since Congress has not seen fit to ***expressly*** authorize a federal court to enjoin a state court with regard to maritime forum non conveniens, Judge Gee and the Fifth Circuit erred in utilizing the doctrine of preemption to affirm the injunction in this case.

Judge Reavley, in his dissent, referred to Judge Gee's utilization of the doctrine of preemption as a "bold new rule of preemption" and it is "bold" only in the sense that it is the *only* decision we can find that takes a position contrary to such authoritative decisions of this Court as ***Amalgamated Clothing***, ***Atlantic Coast Line***, ***Mitchum v. Foster*** and ***Vendo Co. v. Lektro***. The fact that ***Choo III*** represents a signifi-

cant encroachment upon the integrity of statutorily expressed anti-injunction federalism, is all the more reason, we suggest, for this Court to make it clear that the Anti-Injunction Statute means what it says; that this Court's pronouncement in ***Atlantic Coast Line*** that the Anti-Injunction Statute exceptions will be narrowly construed is still the law; and that, as expressly stated in ***Amalgamated Clothing***, ***Atlantic Coast Line***, ***Mitchum v. Foster*** and ***Vendo***, federal preemption is simply ***not*** one of the exceptions in the Anti-Injunction Statute and no injunction can be allowed which rests upon such doctrine.

Lastly, we must pause to note that additional untoward consequences will flow, if the Fifth Circuit decision is allowed to stand, from the fact that the

Fifth Circuit has utilized the doctrine of preemption to nullify the Texas open forum law in admiralty cases. We are referring to the fact that such issue is one which should be decided by the Supreme Court of Texas, as Judge Reavley suggested, 817 F.2d at 326, and not by a federal appellate court.

III.

Certiorari Intervention Is Also Proper, We Respectfully Suggest, Because The Fifth Circuit's Decision Runs Counter To Previous Supreme Court Authority Holding That Forum Non Conveniens Determinations Are Procedural And do Not Constitute Res Judicata.

As we mentioned above, while Judge Gee and the Fifth Circuit did concede that the doctrines of res judicata and/or direct estoppel would not apply with respect to Texas' open forum law, he did improperly contradict previous Supreme Court authority and decisions of other federal courts in holding that, generally speaking, a federal court

forum non conveniens decision can be res judicata or directly estop a determination of that issue by a state court. Certiorari review of such holding is important because, if the Fifth Circuit decision is left to stand, it presents an aberrational intrusion into the scheme previously prescribed by this Court whereby state courts would be free to make procedural determinations under their own procedure, without interference from the federal courts, and that a forum non conveniens determination is such a procedural matter.

This question has two important perspectives to it as far as this case is concerned: the first is whether or not a forum non conveniens determination is *procedural* to the extent that it can never constitute res judicata in the sense of the "relitigation exception"

contained in 28 U.S.C. 2283 and the second is whether or not the doctrine of federal preemption, in a maritime context, can *ever* be held to preempt *procedural* determinations by a state court. As to the first question, in *Parsons v. Chesapeake Railway Co.* a state court, in a FELA case, dismissed the case on grounds of forum non conveniens. The plaintiff did not appeal. Instead, he filed a complaint grounded on the same cause of action in the federal court in Illinois. The defendant filed a motion to transfer the case under 28 U.S.C. 1404(a) to the federal district court for the Western District of Michigan. The federal district judge denied the motion and the defendant sought a mandamus from the Court of Appeals to compel the judge to order the transfer. The Seventh Circuit Court of

Appeals eventually granted the mandamus, directing the transfer. Its ruling was based primarily upon the proposition that the ruling of the state court, granting the forum non conveniens dismissal, was entitled to res judicata effect, thus compelling the federal court to also transfer the case (recognizing that the principles governing a 28 U.S.C. 1404(a) transfer are generally the same as those involved in a forum non conveniens determination).

After granting certiorari, this Court squarely held that the "principles of res judicata are not applicable" to a decision on the forum non conveniens question by one court, when the same action is later filed in another court. This Court discussed thoroughly why this is true. It pointed out that inevitably there are different considerations with

respect to each court. For example, it pointed out that the congestion of the docket, which relates to the "public interest" factors which should be considered by each court, may differ with regard to each court. And other matters may be differently considered. Moreover, the rules governing a forum non conveniens determination in one court may be different from the rules governing forum non conveniens determinations in the other court. As the Supreme Court noted in ***Parsons***:

> The discretionary determinations of both the state and federal courts in this case required, to be sure, evaluations of similar, but by no means identical, objective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation here presented.

375 U.S. at 72-73. ***Parsons v. Cheasapeake*** stands for the firm proposi-

tion that forum non conveniens determinations generally are not entitled to *res judicata* or *collateral estoppel* effect.

There is another reason why the proposition enunciated in ***Parsons*** is correct. In ***Missouri v. Mayfield***, again an FELA case (we do not need to remind this Court that the Jones Act derives its power and authority from the FELA), the plaintiff filed suit in the state court of Missouri and such court denied a forum non conveniens motion, making it clear that it felt it was compelled to do so by virtue of federal law on the subject of forum non conveniens in FELA cases. This Court reversed and remanded, with instructions to the Missouri Supreme Court that it should decide the forum non conveniens question in accordance with its ***own*** procedural notions and policies. This

Court held that the forum non conveniens question is determined in accordance with "procedural policy"; that a state may reject or it may accept the doctrine for ***all*** causes of action begun in its courts (as the Texas' open forum law apparently rejects the doctrine for ***all*** causes of action that qualify under such law) or it may apply its own principles or notions as to each particular case; and, in the final analysis, the Supreme Court stated:

> Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. ***It should be free to decide the availability of the principles of forum non convenines in these suits according to its own local law.*** To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion.

340 U.S. at 5; emphasis ours.

The *Mayfield* rule has been reaffirmed many times. See, e.g., **Norfolk & Western Railway Co. v. Beatty**, 400 F.Supp. 234 (S.D.Ill.1975), aff'd 96 S.Ct. 439. In *Norfolk & Western*, the court stated that the "state rules on forum non conveniens govern in FELA *and Jones Act matters*" filed in the state court because they are procedural in nature. 400 F.Supp. at 237. See also discussion in **Wright & Miller**, *Injunction Against State*, Sec. 4226, p.340 et. seq. and the cases there cited; **Mizokami Bros v. Mobay Chemical Corp.**, 660 F.2d 712 (6 Cir. 1981) (holding that the plaintiff could relitigate the forum non conveniens issue in a Missouri federal district court even though it had been determined adversely to him in an Arizona federal district court); **Domingo v. States Marine Lines**, 340 F.Supp. 811 (S.D.N.Y.

1972) (holding that the prior action of a state court on grounds of forum non conveniens was not res judicata of the forum non conveniens motion before a federal court because "[t]hese decisions are not res judicata as plaintiff argues, and will not be even if they had been made by the courts of New York, rather than Delaware", citing *Parsons*, 340 F.Supp. at 817.); **Roth v. Bank of Commonwealth**, 583 F.2d 527 (6 Cir. 1977)(the relitigation exception under Section 2283 does not apply to procedural matters); **Southwest Airlines Co. v. Texas Intern'l Airlines, Inc.**, 546 F.2d 84 (5 Cir. 1977), cert den. 98 S.Ct. 117; **Lamb Int. v. Kiroff**, 549 F.2d 1052 (6 Cir. 1977), cert den. 431 U.S. 968 (1977); and **International Machinists and Aerospace Workers v. Nix**, 512 F.2d 125 (5 Cir. 1975).

Indeed, several state courts have held that they had the right to deny forum non conveniens motions, even though the very same case had previously been filed in the federal court and the federal court had granted a forum non conveniens motion. **Kahn v. United Technologies Corp.**, 16 Aviation Cases, 17, 651 Conn. (Sup.Ct. 1981); **Boskoff v. Boeing Co.**, 16 Aviation Law Reports, 17, 753 (Sup.Ct.N.Y. 1981); and **Aboujdid v. Gulf Aviation Co.**, 108 Misc.2d 175, 437 N.Y.Supp.2d 219, aff'd 448 N.Y.Supp.2d 427 (1st App. 1982).

And from a federal court perspective, this very question was decided in **Prack v. Wiesinger**, 276 F.2d 446 (4 Cir. 1960). In ***Prack*** the plaintiffs filed suit for injuries sustained while riding in the defendant's automobile. The accident occurred in West Germany, the

plaintiff was a citizen of West Germany, and the defendant was an American who was stationed in West Germany at the time. The plaintiff first filed suit in the state court of Virginia and the cause was removed to the federal court. The federal court then dismissed the action on grounds of forum non conveniens. Thereafter, the plaintiff commenced a similar action in another state court, based upon the same facts, for an amount "less than $10,000.00", and the defendant went back to the federal court and obtained an order that the "removed action be dismissed with prejudice to prosecution of the same cause of action in any court, State or Federal, within the United States." The Court of Appeals reversed, and in so doing stated:

We are of the opinion that Miss Prack's second point of error is well taken. ***The general rule as to the power of a court to determine its own jurisdiction*** is stated in 21 C.J.S. Courts sec. 113 (1940), as follows: "Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact the decision of which is necessary to determine the question of jurisdiction ...." See *Stoll v. Gottlieb*, 1938, 305 U.S. 165; *Fireman's Fund Ins. Co. v. Railway Express Agency*, 6 Cir., 1958, 253 F.2d 780, 784; *Hardy v. Bankers Life & Cas. Co.*, 7 Cir., 1956, 232 F.2d 205, 209; *Hospoder v. United States*, 3 Cir. 1953, 209 F.2d 427, 429; *Taylor v. Hubbell*, 9 Cir. 1951, 188 f.2d 106, 109; *Sullivan v. State of San Paulo*, 2 Cir. 1941, 122 F.2d 355, 358; ... ***These authorities compel the conclusion that the District Court, Alexandria Division, by its order dated September 24, 1959, improperly invaded the prerogative of the state court of Fairfax County to determine its own jurisdiction*** in the last of the three cases instituted by Miss Prack, involving $9,999.99. Weisinger's contention that the District Court was not attempting to determine the state court's jurisdiction but was merely giving effect to the doctrine of collateral estoppel by judgment, is without merit. While the District

> Court could, and actually did, in effect, apply the doctrine of collateral estoppel by judgment in determining its own jurisdiction, ***it is precluded from applying that or any other doctrine to determine the jurisdiction of the state court.***

276 F.2d at 450, 451; emphasis ours.

This Court should grant writ of certiorari to reconcile the conflict between the holding and rationale of the court below, namely Judge Gee's majority opinion, and the Supreme Court's decisions in ***Parsons*** and ***Mayfield*** and the cited decisions of other courts, particularly ***Prack v. Weisinger***. In sum, with regard to the first perspective we have raised with respect to whether a forum non conveniens determination is "procedural" or "substantive", it is important for the Court to grant certiorari and reaffirm that the forum non conveniens issue is

procedural in nature and always should be determined in accordance with the forum court's own law; that the "relitigation exception" of 28 U.S.C. 2283 does not include procedural decisions, such as forum non conveniens determinations; and that forum non conveniens determinations do not constitute "res judicata" within the meaning and intent of matters that may not be relitigated under the Anti-Injunction Statute.

As to the second perspective, involving the issue of how "procedural" determinations relate to preemption under the federal maritime law, Judge Gee conceded that not all maritime matters are preempted and that "like other questions arising under the Supremacy Clause, questions of federal preemption in the maritime context admit of no simple answer". 817

F.2d at 316.[3] And in those instances where the courts have held that federal maritime law does preempt state law it has involved substantive, *not procedural*, issues *or* express statutory authority. See, e.g., **Garrett v. Moore-McCormick**, 317 U.S. 239 (1942) (Court held that the burden of proof issue was one of "substance", not "a mere incident of procedure", 347 U.S. at 249) and *Offshore Logistics, Inc. v. Tallentire* ("the conflicting [wrongful death] standard was not derived just from general federal maritime law, it was explicitly provided for by federal

---

3. See, for decisions where it was held that federal maritime law does not preempt, **Wilburn Boat Co. v. Fireman's Fund Ins. Co.**, 348 U.S. 310 (1965); **Askew v. American Waterways Operators**, 411 U.S. 325 (1972); and **Grant-Smith-Porter Ship Co. v. Rhode**, 257 U.S. 469 (1922).

legislation directly on point", 91 L.Ed.2d at 1931).

As we have already noted, the federal forum non conveniens doctrine is a common law doctrine, **Gulf Oil v. Gilbert**, 330 U.S. 501 (1947), and is a matter of procedure, ***Missouri v. Mayfield***; **Sibaja v. Dow Chemical Co.**, 757 F.2d 1215 (11 Cir. 1981), cert den. 106 S.Ct. 347 (1986); and ***Norfolk & Western Railway Co. v. Beatty, supra.*** But more important to the disposition of this case is that, once again, the question at hand must be considered in the context of 22 U.S.C. 2283. In doing that we find, as stated by the Supreme Court in ***Amalgamated***, that areas of preemption are not delimited "by fixed metes and bounds" and that what is "within exclusive federal authority may first have to be determined by this

Court to be so". 99 L.Ed. at 608.

Thus, since the forum non conveniens question is procedural in nature, no statute gives the force of preemption to federal maritime forum non conveniens law and this Court has not previously addressed that precise issue, we suggest, as was suggested in ***Amalgamated***, that this Court grant certiorari to determine whether maritime forum non conveniens law is "within exclusive federal authority".

IV.

Another Reason The Court Should Grant Certiorari Is To rule Upon The Question Of Whether Or Not A Defendant Who Has Been Unsuccessful In An Attempt To Remove A State Court Action Under The Removal Statutes Can Thereafter Rely Upon the Anti-Injunction Statute For The Purposes Of Securing An Injunction By The Federal Court Against Those Same State Court Proceedings.

In this case, as the facts reveal, when the plaintiffs first filed suit in

the state court, the defendants removed such proceedings to the federal district court and the federal district court denied the plaintiffs' motion to remand; the cause was appealed to the Fifth Circuit and the Fifth Circuit reversed, holding that the federal district court had erred in failing to remand the case to the state court and ordered that the case be remanded. Immediately following the defendants' unsuccessful attempt to utilize the removal statutes, the defendants then went back to the same federal district court and got a permanent injunction, enjoining the state court from proceeding. This kind of procedural manuvering smacks of fatally inconsistent judicial actions (i.e. judicial estoppel), particularly since, in order to remove a cause to the federal court a party has to accept the

fact that the federal court would have jurisdiction over the proceedings, see ***American Fire and Casualty Co. v. Finn***, 341 U.S. 6 (1951), when in fact, in this case, the same federal court had already ruled that it did not have jurisdiction or that it would decline jurisdiction over the proceedings. Moreover, the removing party also has to assume that the state court would have jurisdiction over the same proceedings. See ***Lambert Run Coal Co. v. Baltimore & Ohio Ry. Co.***, 258 U.S. 377 (1922). Otherwise such party's remedy is to move for dismissal for lack of jurisdiction in the state court. In any event, the utilization of the removal statutes would seem to be inconsistent with the position taken in the injunction proceeding, namely that because the federal court had declined jurisdiction

(via forum non conveniens principles) the state court was precluded from accepting jurisdiction. In other words, it was the position of Exxon in the injunction suit that neither the state court nor the federal court could accept jurisdiction, although in the removal action Exxon had to have assumed that that same jurisdiction existed in both courts in order for the removal of the case to be proper.

The Fifth Circuit ignored this issue and we point out that its decision and holding thereby constitutes a conflict with the rationale of **Southern California v. Harper**, 273 F.2d 715 (5 Cir. 1960). While such conflict is with a decision within its own circuit, it does constitute a conflict involving important federal policy considerations (i.e. how the removal statutes interrelate with the Anti-Injunction

Statute). As was stated in ***Southern California v. Harper***:

> The policy against federal interference with a state suit previously filed is of long standing and is a necessary objective in maintaining a balanced federal-state relationship. It is particularly applicable in a case such as the instant case **when apparently the complaint filed in the federal court seeks to use the declaratory judgment statute and the equitable remedy of injunction as substitutes for a non-existent right of removal.** *Kaufman Rudeman, Inc. v. Cohn and Rosenberger*, 2 Cir., 1949, 177 F.2d 849; *Thompson v. Moore*, 8 Cir., 1940, 109 F.2d 372.

273 F.2d at 720.

V.

Lastly, This Court Should Grant Certiorari In Order To Reaffirm The Sacred Principles Of Federalism, Equity, Comity And Abstention.

The Fifth Circuit, though expressly and strongly urged to do so in this case, did not address itself to principles of equity, federalism, comity and abstention. Even if we assume ***arguendo***

that the district court had the power, by virtue of the third exception to Section 2283, to stay the proceedings in the state court, such power should not have been exercised without regard to equitable considerations. "A party seeking an injunction must always satisfy the usual equitable tests for an injunction of irreparable injury and the absence of an adequate remedy at law." 18 C.Wright, A.Miller & E.Cooper, *Federal Practice and Procedure*, Sec. 4426, p. 347. Moreover, the mere fact that a case falls within an exception to sec. 2283, does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster, supra.*

In this action, there was no showing of irreparable harm to the Exxon

defendants if they had to proceed in state court. Nor is it conceivable how defendants could suffer irreparable harm by the acts of plaintiffs. If any irreparable harm has been inflicted, it has been upon Madam Choo who has been denied her day in court for some seven years now, largely due to the procedural manueverings of Exxon. Exxon failed to show the absence of a remedy at law that would justify the injunction. To the contrary, the Exxon defendants need but raise in the state court proceeding their refined and previously filed motion for dismissal on grounds of forum non conveniens, supplemented by an argument of *res judicata* and *collateral estoppel.*

Fundamental principles of equity, comity and federalism also weigh heavily in favor of allowing plaintiffs to

finally proceed with their case on the merits. The unnecessary protraction of this litigation through procedural disputes and appeals should come to an end. Moreover, the fact that the federal court once refused to exercise jurisdiction strongly favors nonintervention by that same court in the state court action. In the recent case of ***Pennzoil v. Texaco***, 107 S.Ct. 1519 (1987), this Court once again warned against federal interference in state court actions. The Court stated that the federal courts, out of respect for comity, should generally "abstain" from involving themselves in state court proceedings. The Court observed that there is no reason why the state courts cannot resolve ***all*** issues which might come before them (even including federal issues), and this would seem to include

questions such as *res judicata*. The Court stated:

> The courts below should have abstained under the principles of federalism enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). Both the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system. ***Similarly, neither of those courts applied the appropriate standard in determining whether adequate relief was available in the Texas courts.*** ....
> * * * * *
> As was stated in *Younger*:
> "This underlying reason ... is reinforced by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, ***and a continuance of the belief that the National government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways*** .... The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and national governments, and

in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44.

....

* * * * *

So long as those challenges relate to pending state proceedings, ***proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand.***

* * * * *

Moreover, denigration of the procedural protections afforded by Texas law hardly come from Texaco with good grace, ***as it apparently made no effort under Texas law to secure the relief sought in this case.*** Cf. *Middlesex County Ethics Com. v. Garden State Bar Assn., supra*, at 435. ... Article VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. ***We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.*** .... Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should ***assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.***

* * * * *

In sum, the lower courts should have deferred on principles of comity to the pending state proceedings.

107 S.Ct. at 1525, 1526, 1527, 1529; emphasis ours.

Indeed, as the Fifth Circuit put it, the state courts are fully capable of handling contentions regarding equitable estoppel and *res judicata* and, therfore, the principles discussed in *Pennzoil v. Texaco* apply with equal force to *res judicata* pleas in the state court:

> We take the view that a complainant must make a strong and unequivocal showing of relitigation of the same issue in order to overcome the federal courts' proper disinclination to intermeddle in state court proceedings. If we err, all is not lost. ***A state court is as well qualified as a federal court to protect a litigant by the doctines of res judicata and collateral estoppel.***

Southern California Petroleum Corp. v. Harper, 273 F.2d at 719.

Petitioners respectfully suggest that it would be in the interest of justice, uniformity and judicial stability for this Court to grant certiorari and, in the context of forum non conveniens determinations, make it clear that principles of equity, federalism, comity and abstention must be respected and given effect.

WHEREFORE, PREMISES CONSIDERED, your Petitioners pray the Court to grant the Writ of Certiorari in this case for all of the reasons stated above.

Respectfully submitted,

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

Joseph C. Blanks, et al.
909 Laurel
Beaumont, Texas 77701

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned, upon his oath and affirmation, hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari has been this day placed in the United States Mail, postage prepaid, and addressed to each counsel of record for all interested parties.

Benton Musslewhite

Benton Musslewhite

SWORN AND SUBSCRIBED TO BEFORE ME, on this 18th day of September 1987.

Notary Public in and for the State of Texas.

My commission expires 10/31, 1988

APPENDIX I

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

***

CIVIL ACTION NO. H-86-606

***

EXXON CORPORATION
AND ESSO TANKERS, INC.

versus

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEON CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE AND JOSEPH C. BLANKS

***

INJUNCTION AND FINAL JUDGMENT

The Motion for Summary Judgment and Application for Permanent Injunctive Relief of Exxon Corporation and Esso Tankers, Inc. for injunctive relief to enjoin Chick Kam Choo and her attorneys of record, Benton Musslewhite and Joseph

C. Blanks, Defendants, from any attempts to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or subsequent State Court proceeding having come on to be heard, and it appearing that the Defendants are attempting to relitigate issues previously decided by this Court in Civil Action No. H-78-477 in Cause No. 84-00125 in the 270th District Court for Harris County, Texas, and that such relitigation will cause irreparable damage to the Petitioners by requiring them to relitigate issues that have been finally decided and are now precluded it is

ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against

Exxon Corporation and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them.

Further ORDERED, that the Plaintiffs recover their reasonable attorneys' fees as subsequently determined by the Court along with their costs.

SIGNED at Houston, Texas, this 15th day of May, 1986.

/s/ Norman Black

United States District Judge

APPENDIX II

EXXON CORPORATION, et al.,
Plaintiffs-Appellees,

v.

CHICK KAM CHOO, et al.,
Defendants-Appellants.

No. 86-2428.

United States Court of Appeals,
Fifth Circuit

May 21, 1987.

(Reported at 817 F.2d 307)

Before CLARK, Chief Judge, GEE, and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

This appeal presents a novel issue: whether the dismissal on *forum non conveniens* grounds of a maritime action by a federal court precludes litigation of the same claims in a state court located in the same city. We conclude that the *forum non conveniens* determination in federal court is binding in a

subsequent action between the same parties in the nearby state court.

A. Facts and Prior Proceedings

Appellant Choo's husband Leong Chang was shipwright. In 1977, he was killed in an accident while helping to repair a vessel docked in Singapore. Madam Choo sued the appellees, who are the owner and the operator of the vessel, in the Houston federal court for damages under the Jones Act, DOSHA, general maritime law, and the Texas wrongful death statute. The district court granted summary judgment on the merits of the Jones Act, DOSHA, and general maritime law claims, but granted the appellees only a conditional dismissal of the remaining claims because Houston was an

inconvenient forum.[1] Madam Choo failed to appeal, and the denial of her subsequent Rule 60(b) motion was affirmed in *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.) (*"Choo I"*), *cert denied*, 464 U.S. 826, 104 s.Ct. 98, 78 L.Ed.2d 103 (1983).

Madam Choo brought the same claims in a Texas state court in Houston[2] Exxon removed the case on diversity grounds to the federal district court, which

---

1. Underlying that decision were subsidiary determinations that Singapore's would be the controlling law and that Singapore was the sit of the accident, was the residence of most of the plaintiffs and witnesses, and could prove an adequate forum.

2. At oral argument, appellants acknowledged that they had originally refiled an identical action including federal maritime claims in state court; they claim now to have voluntarily dismissed al but the state-law claims.

dismissed the case as *res judicata* and sanctioned Choo's lawyers. On appeal, our Court reversed the removal, holding that there was not complete diversity between the parties. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir.1985) (*"Choo II"*). The sanctions were dissolved and the case returned to state court. Exxon then brought this independent action seeking to enjoin the state court proceeding as an interference with the prior judgment of the federal court. The district court granted the injunction and again sanctioned Choo's attorneys. Choo appeals.

B. Jurisdiction and the Anti-Injunction Act

Madam Choo concedes on brief that jurisdiction is proper in this case if the district court was properly

enjoining the state litigation as *res judicata:*

> As a general rule, no independent basis of jurisdiction is needed for the court to entertain an aplicatio for injunction under the third exception [of the Anti-Injunction Statutes, 28 U.S.C. 2283, which allows injunctions of state court proceedings "to protect or effectuate" the federal court judgments]. The matter is considered to be ancillary, supported by the jurisdiction the court had when it entered the original judgment. *See Southwest Airlines Cv. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir.), *cert denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977)] at 89-90, wherein the ancillary jurisdiction to support injunctive relief was supported by erlier action in which the district court *properly* asserted federal question jurisdiction.

Appellant's brief at 10 (emphasis in original). Therefore the only real isue in this case is whether the district court's dismissal of the first action bound all subsequent proceedings in the Houston courts.

As we understand the presentation of Madam Choo's lawyers, she advances three intertwined contentions to show that the Texas court is not bound. The first is that the federal district court's original conditional dismissal of her Texas wrongful death claim was a nullity because the court had dismissed all

federal claims and therefore lacked pendent jurisdiction over the Texas claim. The second is that a Texas state court may properly redetermine the identical *forum non conveniens* issue: whether Houston is a convenient forum for trial of this case from Singapore. the third is that Texas law does not recognize the doctrine of *forum non conveniens* in actions for personal injury or death and hence that the federal court's application of that doctrine is irrelevant to the state court proceeding. These arguments are not explicitly made in the alternative, but we will consider them in that fashion because they are logically disjoined.

Claims

Madam Choo contends that the district court was without power to dismiss her state-law claims. she does not dispute that the district court *intended* to dismiss the Texas claims on *forum non conveniens* grounds. In fact, the magistrate's recommendation in the initial round of litigation in the federal court explicitly included the Texas state claims in the recommendation for conditional *forum non conveniens* dismissal.[3] but because the district court dismissed all her claims under substantive federal law, she argues that the court thereby deprived itself of power to adjudicate her pendent claims, and its attempt to do so was a nullity.

The judgment of the district court sounds inconsistent in this respect. It

3. The magistrate recommended *forum non conveniens* dismissal of the claims remaining in the action in a section entitled "General Maritime Law, Texas Statutes, Other Claims and *Forum Non Conveniens*."

first dismissed all federal claims, including those under "the general maritime laws of the United States," on the merits. Then, it granted a motion for conditional *forum non conveniens* dismissal without specifying what claims were being dismissed on that ground.[4] As

4. The district court's Order of Dismissal reads:

> It is therefore ORDERED, ADJUDGED and DECREED that Defendnt's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Worker's Compensation Act, *and the general maritime laws of the United States.*
>
> It is further ORDERED, ADJUDGED and DECREED that Defendants' Motion to dismiss under the doctrine of *forum non conveniens* is GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense related to any statute of limitations, and conent to satisfy any judgment rendered by said court.

(Emphasis added.) The relevant language in the magistrate's Memorandum and Recommendation is the same.

we have noted, the Texas claims were no doubt meant to be included in this conditional dismissal, but the court did not state which, if any, federal claims were conditionally dismissed.

A sufficient but incomplete resonse to this argument is that even if no federal admiralty claim remained in the case, the district court still retained pendent jurisdiction over the state claims. Dismissal of federal claims on the merits does not deprive a federal court of jurisdiction over state claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Furthermore, even supposing the district court to have abused its discretion in dismissing the pendent state claim as *forum non conveniens*, that ruling was not appealed and thus,right or wrong in the abstract,

is binding on the parties as a practical matter. Courts are no longer sympathetic to the argument that judicial blunders void the jurisdiction or nullify the power of a court. *See Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc)(lack of consent to a jury trial before a federal magistrate as required by statute does not undermine the district court's jurisdiction or nullify the judgment so as to warrant sua sponte reversal on appeal).

But we must reject for more fundamental reasons the contention that the district court was without jurisdiction to dispose of the state claims. The federal court sitting in admiralty is a court of plenary jurisdiction. Such a court is not deprived of jurisdiction by reason of the fact that neither federal statutory law nor general maritime law

provides the substantive law to resolve the matter before it. The *Lauritzen-Romero- Roditis*[5] doctrine applied by the district court is a maritime choice of law doctrine. When an admiralty court determines that foreign law applies, that is simplyone factor to be considered in *forum non conveniens* analysis. It is axiomatic that only a court with jurisdiction over the case can dismiss it as filed in a *forum non conveniens*.

In this case, the district court granted summary judgment on the claim that the substantive general maritime law of the United States governed the

---

5. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

action; but it implicitly acknowledged that the plaintiffs - survivors of a ship repairman killed on an operational vessel in navigable waters - have admiralty tort claims. *See Kelly v. Smith*, 485 F.2d 520, 523-26 (5th Cir.1973) (setting out test for admiralty jurisdiction), *cert denied sub nom. Chicot Land Co. v. Kelly*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); *cf. Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112, 1113 (5th Cir.) (welder injured while working aboard a barge moored for loading in Dubai, United Arab Emirates, is a *Sieracki* seaman[6] entitled to bring an unseaworthiness claim under the general

---

6. *Sea Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946)(harbor workers undertaking traditional tasks and risks of seamen can sue shipowner for unseaworthiness).

maritime law), *cert. denied*, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983). The court simply declined to exercise its undoubted admiralty jurisdiction over claims by Singapore plaintiffs on an alleged tort in Singapore to which the substantive law of Singapore should be applied. Therefore, the conditional dismissal included maritime tort claims and the federal court necessarily had jurisdiction to dispose of pendent state claims.

We have established that Madam Choo's claims under Texas law were conditionally dismissed as *forum non conveniens* in the first round of litigation by a court with power to do so. We now squarely face Choo's alternative argument: A Texas state court may nevertheless redetermine whether *forum non conveniens* applies to a case

previously dismissed on that ground in a federal court a few blocks away. This poses issues both important and novel, to which we now turn.

D. The Effect of the Forum Non Conveniens *Dismissal*

Federal courts have permitted relitigation of the *forum non conveniens* issue in a different federal forum when the plaintiff has demonstrated different contacts between the new forum and the underlying dispute. In *Mizokami Bothers of Arizona v. Mobay Chemical Corp.*, 660 F.2d 712, 716 (6th Cir.1981), an Arizona district court had dismissed a dispute between international parties on *forum non conveniens* grounds. The Sixth Circuit held that the plaintiff could relitigate the *forum non conveniens* issue in a Missouri district court.

> Appellant here has contended that the contacts of the parties with Missouri, the availability of witnesses in Missouri and other relevant factors make the inquiry distinct. We believe the record demonstrates sufficient differences in the underlying facts that consideration of the convenience of a Missouri forum is not forclosed.

660 F.2d at 716. The *Mizokami* court distinguished *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir.1977). In *Pastewka*, the Third Circuit held that a *forum non conveniens* determination in a New York federal district court was *res judicata* as to a Delaware federal district court when the underlying dispute involved a maritime collision twelve miles off the coast of England:

> The appellants point to no objective fact establishing that, unlike New York, Delaware would be a more convenient forum than England or that Delaware would be even as convenient as New York. Indeed, it appears that the only reason Delaware was resorted to was that under 28 U.S.C. 1332(c) Texaco, Inc., a Delaware corporation,

may be sued there.

565 F.2d at 853.

Madam Cho's presentatin to us does not point to any "underlying facts," *Mizokami*, 660 F.2d at 716, or "objective fact," *Pastewka*, 565 F.2d at 853, that make a Texas court in Houston a more convenient forum for this litigation than a United States District Court in Houston. We therefore contemplate a more extreme situation than that dealt with in *Pastewka*: there the localities dealt with were England (site of accident), New York (forum first found inconvenient), and Delaware (second forum, precluded by first determination). Here the corresponding ones are: Singapore, Houston (federal court), and Houston (state court). There can be no doubt that there is but one issue, an

issue that has already once been decided by the federal district court. While that decision was probably correct, what signifies is that Cho did not appeal from it so its propriety is not even before us. The only question before us is whether the *forum non conveniens* issue itself is the same in Houston federal and state trial courts. Madam Choo has alleged no facts relevant to *forum non conveniens* that could lead us to conclude that a state court is a more convenient forum.

There is, to be sure, little authority on the point. Other than *Mizokami* and *Pastewka*, discussed above, Professor Wright cites only *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D.N.Y.1972), and *Anastasiadis v. Mecom*, 265 F.Supp. 959 (S.D.Tex.1966). *Domingo* is arguably in Madam Choo's

favor; we discuss it below. In *Anastasiadis*, our brother Ingraham, then on the district bench, dismissed an attempted *in personam* action against the beneficial owner of a vessel on grounds of direct estoppel because a former action in rem against the vessel had been dismissed on a fiding that the courts of Greece were its proper forum. Professor Wright concludes:

> Dismissal on *forum non conveniens* grounds does not establish claim preclusion; ordinarily it cannot work issue preclusion as to other courts because the convenience issues are intrinsically different, *but issue preclusion is appropriate if the issue actually remains the same.*

18 C.Wright, A.Miller & E.Cooper, *Federal Practice and Procedure: Jurisdiction* Sect 4436, at 346 (1981) (emphasis added; footnotes omitted). Here the issue *does* remain the same: a state court in Houston is as convenient

or inconvenient a forum for trial of a case from Singapore as a federal court in Houston.

The species of *res judicata* with which we deal today is known as direct estoppel. Judge Gibbons, writing for the Third Circuit in *Pastewka*, states the doctrine clearly:

> The appellants concede, as they must, that had the New York judgment, now final, beenon the merits, *res judicata* would bar the Delaware action. But they urge that the policy underlying *res judicata* does not apply to matters in abatement which may involve the exercise of discretion. A nonmerits judgment following a plea in abatement, however, does create a direct estoppel as to matters which were actually adjudicated. This is made clear in the Restatement of Judgments 49, Comment b (1942)....

Pastewka, 565 F.2d at 853.[7]

---

7. The passage from the Restatement to which Judge Gibbons refers reads:

> *b. Effect of judgment as to issues decided.* Although, where the judgment

In response to this sparse but persuasive authority, Madam Choo's attorneys cite only *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 84 S.Ct. 185, 11 L.Ed.2d 137 (1963)

for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated inhe prior action. Thus, if the action was dismissed because of the nonjoinder of a third person as defendant, and the plaintiff thereafter brings an action on the same cause of action without joining the third person, the plaintiff is not entitled again to litigate the question whether the third person was a necessary party.

This is an instance of direct estoppel rather than collateral estoppel (See sect. 68), since the second action is based upon the original cause of action (see Sect 45(c) and Comment d thereon). The matter actually litigated and determined is *res judicata* between the parties in a subsequent action involving the same matter, whether the subsequent action is based upon the same or a different cause of action.

Restatement (First) of Judgments Sect. 49 comment b (1942); *see also* Restatement (Second) of Judgments Sect. 20 comment b (1982).

(per curiam). *Parsons* held that a state court *forum non conveniens* dismissal is not *res judicata* in a federal court applying 28 U.s.C. Sect. 1404(a), the statutory change-of-venue analogue of *forum non conveniens*. We agree with Judge Gibbons that *Parsons* is not inconsistent with the direct estoppel by judgment rule. *Pastewka*, 565 F.2d at 854. First, *Parsons* points out various considerations material to a state court's *forum non conveniens* analysis that will almost always differ from those informing a federal court's Sect. 1404(a) analysis. For example, the Illinois state court had dismissed the action after finding that the Michigan town where the plaintiff's injury allegedly occurred was the proper forum. The Supreme Court pointed out that there was no federal court in that town; the

nearest was 60 miles away. That alone would be a materially different "objective fact" under the standard we announce today. Second, the Supreme Court has recently affirmed explicitly what is implicit in *Parsons*: Sect. 1404(a) is not a codification of the common law doctrine of *forum non conveniens*. Although *forum non conveniens* analysis is similar, the federal district court has more discretion under the statute than under the common law doctrine. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253, 102 S.Ct. 252, 264, 70 L.Ed.2d 419 (1981). Therefore, issue preclusion is less appropriate in the *Parsons* context.

Our research has uncovered one case that is superficially favorable to Madam Choo. In *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S. D. N. Y. 1972), the

court dismissed an action by brought against an United States shipowner by Phillipine citizens. The U.S. Ship had collided with and sunk a Phillipine ship in Manila harbor. Many of the plaintiffs had filed the same suit in Delaware and in an earlier suit in the New York State courts. The New York state courts had dismissed the suit as *forum non conveniens*, but the Delaware courts had denied a *forum non conveniens* motion to dismiss. The plaintiffs argued that (only) the Delaware decision was *res judicata*. The federal court disagreed:

> The decision of [the Delaware courts] is not in any way determinative of the issues now before me. These decisions are not *res judicata*, as plaintiff argues, and would not be even if they had been made by the courts of New York, rather than Delaware. *See Parsons v. Chesapeake & Ohio Ry. Co.* Nor do I consider them in any way binding upon me. [Footnote:] It will be remembered that the New York Courts have already decided the question the other way

by dismissing one of the actions.... 340 F.Sup. at 817 & n.6 (part of citation omitted). The thrust of this passage is clearly contrary to the authority we have reviewed thus far. But we are comfortable distinguishing *Domingo* on several grounds. First, the district court spent a large part of its analysis expressing concern about its overcrowded docket. 340 F.Supp. at 816. This is the kind of "objective fact" that can undermine an assertion that a prior determination of *forum non conveniens* is *res judicata* in anew forum. Madam Choo, for example, has not alleged differing docket conditions in the federal and state courts in Houston. Second, the court was hardly presented with a compelling case for direct estoppel: the Delaware courts had decided in favor of the plaintiffs and

the New York courts had decided in favor of the defendant on the precise issue presented to the federal court. Finally, the federal district court was sitting in admiralty. As we elaborate below, the special requirement of federal supremacy in matters maritime may justify the district court's refusal to follow decisions made under state notions of *forum non conveniens*.

We conclude that once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, that issue may not be relitigated. In the case of *forum non conveniens*, the plaintiff in the new forum must do more than ask for a rebalancing of *forum non conveniens* considerations. He must show objective facts relevant to the issue that mater-

ially alter the considerations underlying the previous resolution. Here, n the ordinary case, our inquiry would be complete. Texas law presents a further peculiarity, however, one that drives us to consider larger matters indeed.

E. The Texas "Open Forum" Law

Faced with the above, Madam Choo's counsel responds somewhat as follows: "Supposing that the Texas forum is indeed an inconvenient one, and supposing further that the federal court's decision that it is inconvenient would ordinarily settle that matter for state court purposes as well, what prevents a state from throwing open its doors so as to become courthouse to the world? from hearing all cases from anywhere, regardless of how convenient

or inconvenient to court, witnesses, or parties?" "And in fact," he continues, "that is exactly what Texas had done for cases involving personal injury and wrongful death." The contention is not fanciful: Since early in this century, Texas has maintained a statute in more or less the form of the present Vernon's Civil Practice and Remedies Code Sect. 71.031:

> Sect. 71.031. Act or Omission Out of State
>
> (a) An Action for damages for the death or personal injury of a citizenof this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for

beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Tex.Civ.Prac. & Rem.Code Sect. 71.031 (Vernon 1986).

No one can say whether Texas courts will place upon this statute the construction for which Madam Choo contends: that Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere

else.[8] The Texas Supreme Court has, however, as recently as December 1984 reaffirmed its longstanding view that, although the question is an open one, this may in fact have been the Texas Legislature's intent.

The opinion to which we refer is *Couch v. Chevron International Co.*, 682 S.W.2d 534 (Tex.1984); one that is the more striking by reason of its procedural setting, as we explain in the

---

8. Acquiring personal jurisdiction over some defendants may, of course, present practical difficulties; and at some point considerations of due process are doubtless implicated when a defendant is required to stand trial at the opposite end of the earth from the location of witnesses, site of the accident, etc. Legislature's intent.

margin.[9] There the Texas Court declined review of a judgment for defendant in a Jones Act case strikingly similar to this, one brought to Texas from the offshore oil fields of the North Sea on behalf of Scottish plaintiffs by one of counsel in today's case. After losing a

---

9. The Texas Supreme Court, the state's highest civil legal authority, exercises a chiefly discretionary power of review. Unlike the United States Supreme Court, which regularly and unavailingly exhorts those who follow its proceedings to refrain from drawing inferences from its actions denying certiorari, the Texas Court responds to petitions for writ of error with orders of denial which are and are intended to be informative. One such notation is "no reversible error," which indicates approval of the judgment but not of its reasoning. In recent times, that court has adopted a practice of writing on infrequent occasions to explain its reasons for declining to adopt the reasoning of an opinion although approving its outcome. The opinion cited is one whch the Texas Court determined was on an issue sufficiently significant to merit such treatment.

motion to dismiss for *forum non conveniens* in the trial court, the plaintiffs had moved for a new trial onthe ground that they were also asserting a claim under Tex.Rev.Civ. Stat.Ann. art. 4678 (Vernon Supp.1984), the preceding codification of Sect. 71.031 quoted above. The trial court denied the motion on the theory that the plaintiffs had waived by delay the right to invoke article 4678. The Texas court of appeals affirmed on the ground that *forum non conveniens* dismissal was appropriate despite the invocation of article 4678. *Couch v. Chevron International Oil Co.*, 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.] 1984). The court of appeals reasoned that, because this was a Jones Act case, federal maritime law applied, and, assuming them to be inconsistent, the

federal *forum non conveniens* doctrine preempted the statute. The Supreme Court affirmed the judgment. Lest there be any doubt about its reasons for doing so, however, it was at pains to explain that waiver, not *forum non conveniens*, was the basis:

> Responding to the plaintiff's appeal, the defendants urged: (1) that the plaintiffs' failure to timely plead for relief under article 4678 served to waive any right to recover under that statute; and (2) even if plaintiffs properly pleaded an article 4678 cause of action, the doctrine of *forum non conveniens* still would require a dismissal of this cause. In affirming the trial court, the court of appeals chose not to base its decision on the plaintiffs' waiver of the article 4678 cause of action. 672 S.W.2d 16. Rather, the court sustained the defendants' alternative argument that, even if the article 4678 cause of action were pleaded properly, the dismissal for *forum non conveniens* still was correct. *Id.* at 18.
>
> We refused this writ application, finding no reversible error, because we agreed that the plaintiffs waived their article 4678 cause of action. The court of appeals opinion, however, does not mention this waiver. Although the court of appeals reached the correct decision, that part of its opinion pertaining to article 4678 and *forum non conveniens* is dicta. Thus, the applicability of *forum non conveniens* to an article 4678 cause of action is an open question. *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex.1962). Consequently, for the reasons stated, we overrule petitioners' motion for rehearing on the application for writ of error.

Couch, 682 S.W.2d at 535. If *Couch* left any doubt that the Texas Supreme Court holds strong views on the technically "open question" of the applicability of *forum non conveniens* to an action under Sect. 71.031, that doubt was all but laid to rest the following year. In *McNutt v. Teledyne Industries, Inc.*, 693 s.W.2d 666 (Tex.App.-Dallas 1985), another court of appeals, pointing to the phrase "may be enforced" in the statute, ruled that Texas courts have discretion to allow or not to allow an action under Sect. 71.031, and that the

trial court had not abused its discretion in granting a *forum non conveniens* dismissal. The Texas Supreme Court promptly granted a writ of error, 29 Tex.Sup.Ct.J. 66 (1985), vacating the judgment as moot in December 1985 after the parties settled. The actions of the Texas Court in *Couch* and *McNutt* make clear the substantial likelihood that it will decline to acknowledge the doctrine of *forum non conveniens* even in a maritime case governed by federal law. Indeed, *Couch* was such a case.

Madam Choo contends that the existence of Sect. 71.031 precludes *forum non conveniens* analysis in a personal injury or death case filed in a Texas state court; and, given the broad hints thus far dropped by the Texas Supreme Court, it is hard to disagree that this may be its view of the statute. From this pre-

mise, she concludes that a *forum non conveniens* dismissal of such an action by a federal court cannot be *res judicata* in a Texas state court because Sect. 71.031 creates a potentally dispositive legal issue that ha not yet been fully and finally litigated between the parties. Again, as a general matter, we can find no fault with her logic: When a federal court and a Texas state court have concurrent and *independent* jurisdiction over a personal injury or death action, in the end Sect. 71.031 may well be construed by the Texas Supreme Court to preclude direct estoppel in the state courts by a *forum non conveniens* dismissal in the federal courts.

But this is a maritime case; it does not involve independent actions in the state and federal courts. The state

court's jurisdiction is derivative; and it is bound to apply the general maritime law of the United States - a jurisprudence of which federal courts are the custodians, as Texas courts are of Texas law.

F. The Uniformity Doctrine and the Supremacy of Maritime Law

Within its sphere of operation, the maritime law of the United States is supreme; and the states are without power to disrupt it:

> [T]he "saving to suitors" clause [now codified at 28 U.S.C. Sect. 1333] allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics, Inc. v. Tallentire, 106 S.Ct. 2485, 2495, 91 L.Ed.2d 174

(1986). The Supreme Court laid the foundation of this doctrine in a series of cases 70 years ago. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920). although the broad pronouncements of those early cases have been often hedged and qualified, *see, e.g., Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373-75, 79 S.Ct. 468,

480-81, 3 L.Ed.2d 368 (1959), their core meaning is indisputable. "If there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfer in the field of its working." G. Gilmore & C. Black, *The Law of Admiralty* Sect. 1-17, at 48 (2d ed. 1975).

Like other questions arising under the Supremacy Clause, questions of federal preemption in the maritime context admit of no simple answers. We must turn to precedent for assistance in

determining when maritime law preempts inconsistent state laws.

1. The Relation Between Maritime Law and State Law

The preemption test in the maritime field is usually stated something like this: "Although state law may supplement maritime law where maritime law is silent, or where a local matter is at issue, state law may not be applied where it would conflict with maritime law." *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986)(citations omitted). This test is not very helpful in today's case; the state law under scrutiny is plainly inconsistent with maritime law, and the questin is whether the type or degree of inconsistency is objectionable. A better definition for present purposes appears

in an earlier decision of our Court:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

J. Ray McDermott & Co. v. The Vessel Morning Star, 457 F.2d 815, 818 (5th Cir.)(en banc)(Ship Mortgage Act need not be supplemented by state law), *cert denied*, 409 U.S. 948, 93 s.Ct. 271, 34 L.Ed.2d 219 (1972). This test contains several concrete ideas. First, state law can be used to "fill the gaps" of maritime law; the implication is that the state law provides detailed distinctions that are absent from and of little or no concern to maritime law. Second, state law is less likely to be used to supplement maritime legislation.

The idea here is partly that Congress is supreme in matters maritime and partly that legislation is more likely than judge-made law to be complete and self-sufficient. *Cf. Mobile Oil corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)(DOSHA may not be supplemented by judge-made recovery rules). Consequently, any inconsistent state law is likely to conflict with statutory maritime law - to be inconsistent in the preemptive sense. Third, state law inconsistent with the "characteristic features" of the maritime law is preempted in an admiralty case. Finally, as in other areas of federal preemption, state law is preempted by maritime law if it affects international or interstate relations. With the aid of this definition and our own research in the

cases, we have indentified five factors - more accurately, five concepts or clusters of ideas - that inform maritime preemption analysis. The first and second factors cut toward the application of state law, the fourth and third toward preempton, and the fifth cuts in both directions indiscriminately.

The first factor is that state law is not preempted when it contains a detailed scheme to fill a gap in maritime law. In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), for example, the Supreme Court noted that there was no federal admiralty law to govern the application of terms and warranties in a marine insurance contract. The Court decided that the maritime court should apply state law

instead of creating a uniform maritime law of insurance contracts. Although this decision has been criticized by commentators, *se, e.g.*, Gilmore & Black, Sect. 1-17, at 48-49, the Supreme Court reasonably believed that more uncertainty would result from the case-by-case creation from whole cloth of a federal maritime insurance law than from the application of a variety of already well-developed state laws. 348 U.S. at 319, 75 S.Ct. at 373.

The second factor is that state law is not preempted when the law regulates behavior in which the state has an especially strong interest. The venerable phrase "police power" is often used to express this overriding interest in self-regulation. *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280

(1972)(Florida oil spill regulations); *Wilburn Boat co. v. Fireman's Fund Insurance Co.*, 34 U.S. at 316-19, 75 S.Ct. at 371-73 (traditional and plenary state power to regulate all forms of insurance). The "maritime but local" idea is a corollary; the state interest, whatever its magnitude, is viewed as greater than any maritime concern. See, e.g., *Grant-Smith-Porter Ship co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed.2d 321 (1922)(carpenter injured while building ship on navigable waters cannot bring action in admiralty but is restricted to state workman's compensation); *cf. Kamani v. Port of Houston Authority*, 702 F.2d 612, 614 (5th Cir.1983)(action by longshoreman working aboard ship; remand question whether state or maritime statute of limitations should apply to maritime

action brought against state under the Texas Tort Claims Act).

The third factor is that maritime law preempts whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commecial actors. This notion is sometimes simply referred to as the need for uniformity, but uniformity is obviously not an end in itself or else state law would *always* be preempted. A corollary of this concept is the notion found in the *J. Ray McDermott & Co.* test of "characteristic features" or core principles of the maritime law. 457 F.2d at 818. Applying state law inconsistent with "characteristic features" would defeat the reasonably settled expectations of maritime actors. The most striking example of the importance

of uniformity is *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)(overruling one hured-year-old precedent to create a uniform maritime action for wrongful death in territorial waters).[10] Since uniformity is related to predictability and to reasonable legal expectations, it is of greatest importance when legal relations are not predictably related to a certain locale and its laws. The *Moragne* Court ridiculed the fluctuating rights and responsiblities of shipowners

---

10. *Moragne* can also be viewed as the last in a series of Supreme Court decisions driven by the final factor: maritime plaintiffs should win. *See* Gilmore & Black, Sect 6-61, at 465-66.

and crew under the *Harrisburg-Tungus*[11] *regime as a ship sailed blithely through waters covered by DOSHA, territorial waters of states that gave wrongful death remedies, and waters of states that did not. Compare this to the Wilborn Boat* maritime insurance contract made in Texas, covering a boat on the inland waters of Texas, with an eventual suit on the contract in Texas state court, removed to federal.

The fourth factor is that maritime law preempts state law when the state law impinges on international or interstate relations. This concept is so basic to federal maritime jurisdiction that we find only generalized statements and no disputes about it in the cases.

---

11. The *Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524(1959) (state laws giving action for wrongful death on territorial waters can be enforced in admiralty); *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)(by analogy to common law, no maritime action for wrongful death).

But there are powerful analogies in other areas of preemption doctrine that reflect the sovereign power of the fedeal government to regulate foreign relations and relations between the states. For example, state regulation of both resident and nonresident aliens is frequently held preempted by federal law even when the state law is not inconsistent with any particular federal law. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 102 s.Ct. 2977, 73 L.Ed.2d 563 (1982) (state university may not charge resident aliens out-of-state tuition even though aliens are exempt from state taxation by federal law); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)(state restrictions on welfare benefits available to resident aliens preempted by fedeal authority to regulate immigration). And

this is so regardless of the fact that traditional areas of state regulation and powerful state interests are involved. *See Zschernig v. Miller*, 389 U.s. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968)(Oregon inheritance statute requiring state judicial inquiry into relation between non-resident aliens and their country of domicile is an invalid intrusion by the state into foreign affairs). Matters of import to foreign relatons are inherently matters of uniquely fedeal competence. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964)(federal "act of state" doctrine applied in a diversity case: "ordering our relationships with other members of the international community must be treated exclusive as an aspect of federal law").

The final factor, stated baldly, is that plaintiffs should win personal injury or death maritime tort claims. This concept points indiscriminately toward state or federal law depending on the case. It was one important technique used by the Supreme Court and lower courts during the 1950s and 1960s to keep admiralty law in line with the land-side revolution in tort law. *See* Gilmore & Black, Sect 6-61, at 463-68. Instead of constantly liberalizing maritime law, the federal courts would allow state law to control if the result was favorable to the plaintiff. presently, this thumb-on-the-scales concept is on the decline in maritime

law.[12] The old revolution is now fixed as the new orthodoxy; and we have begun to doubt both the wisdom of further change and our institutional competency to undertake it. *See State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1032-34 (5th Cir.1985)(en banc) (Gee, J., concurring), *cert denied*, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). We do not consider it in our analysis below.

---

12. *See, e.g., Branch v. Schumann*, 445 F.2d 175, 178 (5th Cir.1971)(Florida may not impose higher standard of care on owner-operator of a motorboat than the "reasonableness" standard of general maritime law); *cf. Byrd v. Byrd*, 657 F.2d 615, 617-18 (4th Cir. 1981) (admiralty court should not apply Virginia inter-spousal immunity doctrine; trend is away from this immunity; state law should not be applied "where its application would defeat an otherwise meritorious cause of action")(citing cases).

2. Forum Non Conveniens *and State Law*

The next question is whether under these standards Sect. 71.031, the Texas "open-forum" law, is preempted by maritime *forum non conveniens* doctrine in a maritime case brought by a non-resident alien. But first we face one twist. The traditional view of concurrent state jurisdiction over maritime matters under the "saving to suitors" clause is that states are free to apply their own common law "remedies" as long as substantive maritime law governs. *See Chelentis*, 247 U.S. at 382, 38 S.Ct. at 504 ("The distinction between rights and remedies is fundamental."); *cf. Offshore Logistics*, 106 S.Ct. at 2495 (states' "substantive remedies" must conform to maritime standards). It has been universally and

correctly assumed that state procedural rules govern actions in state courts under the "saving to suitors" clause - the "reverse-*Erie*" metaphor captures this assumption perfectly. Some courts have held that *forum non conveniens* is "procedural" for *Erie* purposes. *See, e.g., Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.1985), *cert denied*, 106 S.Ct. 347, 88 L.Ed.2d 294 (1986). Therefore, if the "reverse-*Erie*" doctrine is perfectly symmetrical, it follows that state courts are not obligated to apply federal *forum non conveniens* analysis in maritime cases.

We reject this facile syllogism; drawing conclusions from metaphors is dangerous. The reason that state court procedures are not preempted by maritime law is that they almost never - before this case we might rashly have said

"never" - conflict with it. When they do, however, it is clear that they must yield. Among several examples of this rule that might be cited is *Garrett v. Moore-McCormick Co.*, 317 U.s. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). In that case an injured seaman, having first released his claim, later brought a Jones Act suit on it in the state courts of Pennsylvania. The state court, applying its rule that one who attacks the validity of a written release has the burden of proof - and a heavy one at that - gave judgment for the defendant despite a jury verdict favorable to the seaman. On resort to it, the Pennsylvania Supreme Court drew precisely the substance/procedure line, concluding that "the rule as to burden of proof on releases does not affect the substantive rights of the parties, but

is merely procedural, and is therefore controlled by state law." 317 U.S. at 242, 63 S.Ct. at 249. Speaking through Justice Black, a unanimous Supreme Court drew precisely the substance/procedure line, concluding that "the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is therefore controlled by state law." 317 U.S. at 242, 63 S.Ct. at 249. Speaking through Justice Black, a unanimous Supreme Court reversed and directed that the more lenient (to the seaman) federal procedural rule must be applied: that in establishing the validity of a seaman's release the burden of proof - and a heavy one at that - is on the person who relies on it.

Because the *Erie* diversity doctrine

and the "reverse-*Erie*" maritime doctrine spring from distinct principles and policies, there is no reason to expect a perfect symmetry between them. In the *Erie* context, the substance/procedure dichotomy is simply shorthand for distinctions that must be drawn on the basis of policies underlying the doctrine.[13] The "reverse-*Erie*" question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law. Therefore, the question of the effect on Sect. 71.031 remains, and we must analyze it under the framework set out above.

---

13. For example, federal courts sometimes follow state "procedural" rules in diversity cases. *See, e.g., Conway v. Chemical Leaman Lines, Inc.*, 540 f.2d 837 (5th Cir. 1976)(applying Texas evidence rule that evidence of widow's ceremonial remarriage is admissible in wrongful death action).

It is obviious from the factors which we have outlined that Sect. 71.031 loses on all counts. Federal *forum non conveniens* analysis must preempt Sect. 71.031 in a maritime suit by an alien in Texas courts. The first factor - using state law to fill gaps - is inapplicable at best. This factor actually cuts towards federal law because *forum non conveniens* is well-articulated federal doctrine while the meaning of Sect. 71.031 is not yet settled. The second factor - "police power" or "maritime but local" state interests - gives the state law little support in this context. Whie Texas has an undeniably powerful interest in defining the jurisdicti of its courts, its interest in the substance of claims by non-resident aliens arising from activities in foreign lands cannot be considered

strong. By its terms, the statute applies only to a "wrongful act, neglect, or default causing the death or injury [when it] *takes place in a foreign state or country.*" Sect 71.031 (a) (emphasis added). This conclusion is reinforced by the circumstance that the defendant in a maritime claim involving Sect. 71.031 need not reside in Texas. In the context of international maritime commerce, the defendants are just as likely to be aliens as are the plaintiffs.

The third factor - uniformity and predictability of maritime law - points forcefully toward preemption. *Forum non conveniens* is a "characteristic feature" of maritime law. The doctrine has its roots inthe maritime law, *see generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal*

Courts in Matters of Admiralty, 35 Cornell L.Rev. 12 (1949), and appeared in maritime cases in the federal courts shortly after their birth. *See Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264, 2 L.Ed. 266 (1804).[14] When

---

14. In this case, a preliminary question has been made by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested, except for the owners of the cargo of the Firm, are not Americans, a doubt has been suggested respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overblance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objecte to, there ought to be none, where the parties assent to it. 6 U.S. (2 Cranch) at 264 (Marshall, C.J.).

the Supreme Court first introduced *forum non conveniens* analysis into the mainstream of federal jurisprudence, the dissenters argued that the doctrine should be confined to the admiralty and equity courts from whence it came. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 513-15, 67 S.Ct. 839, 845-46, 91 L.Ed. 1055 (1947)(Black, J., dissenting). As we elaborate below, the need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry. Even standing alone, these theoretical considerations might lead us to conclude that any state law inconsistent with the doctrine should be preempted; but there are powerful practical reasons as well.

If the Texas courts interpret Sect. 71.031 to require them to take jurisdiction over cases to which it applies, maritime actors throughout the world will be subject to suit in the state courts of Texas on claims arising around the world as long as they have sufficient contacts here for personal jurisdiction to be had. They will be available for suit even if they are aliens, the plaintiffs are aliens, and the transaction complained of by the plaintiff has no relation whatever either to Texas or to the United States. furthermore, if such a Sect. 71.031 case can be removed to the district court, then federal *forum non conveniens* may be applied and the case dismissed. *See, e.g., Sibaja v. Dow Chemical Co.*, 757 F.2d at 1219. thus crucial aspects of the outcome of the litigation will turn

on the fortuities of diversity. To make matters worse, the holding of our Court in an earlier phase of this litigation means that actions between an alien plaintiff and an alien defendant in the courts of Texas will not be removable while those involving an alien plaintiff and a United States defendant undoubtedly will be removed and often dismissed for *forum non conveniens*. *See Choo II*, 764 F.2d at 1152 (no diversity jurisdiction in suit between aliens). If Sect. 71.031 is interpreted as Madam Choo urges, its general effect will be the random, unpredictable availability of Texas courts to foreign plaintiffs depending on the requirements of the statute and the contacts of the defendants with Texas. The non-removability of Jones Act claims is one more significant variable in this bizarre

jurisdictional equation. Add in the ability of *domestic* defendants - but alien defendants - to remove non-Jones Act cases to federal court and have the action dismissed, and the effect of Sect. 71.031 becomes positively irrational. We cannot tolerate this pointless intrusionon the basic uniformity of the maritime law.

G. Federal Forum Non Conveniens: *Balancing Private Interests and International Effects*

Federal law controls the international role of all courts in the United States. *See Zschering v. Miller*, 389 U.S. 429, 436, 88 S.Ct. 664, 668, 19 L.Ed.2d 683 (1968)(state court inquiries into the internal affairs of foreign nations intrude on exclusive federal power over foreign affairs and international relations and are unconstitutional under

the Supremacy Clause). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), for example, the Supreme Court went out of its way entirely to observe that the federal "act of state" doctrine must apply even though that case was brought into the federal courts in New York by diversity of citizenship and New York recognized an "act of state" doctrine all but identical to the federal one. The "act of state" doctrine, like the doctrine of *forum non conveniens*, is a prudential doctrine of judicial self-limitation in an international context. *See* R. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964)(the "decision to defer [under the act of state doctrine] is a way of explaining that a domestic court is not a suitable forum within

which to make the determination of validity. In this respect, the act of state doctrine resembles the doctrine of *forum non conveniens*"). The foreign Sovereign Immunities Act is another example of the supremacy of federal law when international interests are implicated: it necessarily preempts inconsistent state laws beause it must be applied in *all* U.S. courts, state and federal. *See* 28 U.S.C. Sect. 1602 *et seq*. Federal foreign policy interests do not disappear when purely private foreign parties come before U.S. courts. Even in the seemingly domestic setting of a third-party indemnification complaint in a products liablity case, the Supreme Court has recently commanded the state courts to rethink their analysis of personal jurisdiction in light of the inherent foreign policy

implications:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens of an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *United States v. First National City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965)(Harlan, J., dissenting).

Asahi Metal Industry co. v. Superior Court of California, Solano City, 107 S.Ct. 1026, 1034-35, 94 L.Ed.2d 92 (1987). In situation after situation, Congress and the Supreme Court have made the availability of courts in the United States to foreign plaintiffs and against foreign defendants exclusively a matter

of federal law, and they have consistently mandated self-restraint in asserting jurisdiction over arguably foreign disputes.

As we have noted, the doctrine of *forum non conveniens* arises from and has long been a part of the maritime law of this nation. This should not be surprising, considering that the inherently transnational nature of shipping creates international controvesies; maritime actors, by the nature of their business, cannot avoid sufficient "minimum contacts" to subject themselves to the jurisdiction of many nations. these jurisdictional minima are not enough to protect maritime actors:

> [T]he virute and utlizity of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it

> is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

Lauritzen v. Larsen, 345 U.S. 571, 581, 73 S.Ct. 921, 926, 97 L.Ed. 1254 (1953). By comparison, non-maritime commercial actors can do a huge volume of business in the United States wihout subjecting themselves to jurisdiction by simply avoiding direct territorial contacts. *See Ashahi Metal Industry Co.* (assertion of jurisdiction over Japanese manufacturer of tire valves by California violates due process; despite large number of sales in California of tire tubes incorporating its valves, Japanese valve maker does not directly solicit business or make sales there). When foreign and domestic admiralty defendants are haled into court in the United States, our maritime law has long

afforded them many protections, including the "defense of inconvenience," to avoid having to defend themselves in the United States against claims under U.S. law when a more optimal forum or more appropriate law is available.[15] It is

---

15. Domestic maritie defendas operate in an international context, and the reasons behind the rule of *forum non conveniens* apply to their extraterritorial activities with equal force. In discussing the related problem of the extraterritorial reach of domestic law, professor Richard Falk has written:

> Rare use is made of the competence conferred upon a state by the nationality principle [of legislative and adjudicative jurisdiction]. This generally spares Americans abroad from the burden of conforming to a legal standard in addition to the one established by the territorial state. It also saves the United States from making inconvenient assertions of legal control in which the tribunal would find itself often quite remote from the evidence, the context of the occurrence, and witnesses .... This encourages a reciprocal deference and simplifies the legal superstructure of the private lives of those who cross borders.

R. Falk, *The Role of Domestic Courts in the International Legal Order* 40 (1964).

precisely one crucial prudential choice - the convenience of the forum and its fairness to the admiralty defendant in the international context - that the Texas statute appears to abrogate.

The Supreme Court has fought a long maritime battle against the kind of parochial thinking embodied in the Texas "open-forum" law. In *Lauritzen*, for example, the Court gave a limiting reading to the all-inclusive language of the Jones Act because of considerations of comity and self-restraint.

> [C]ourts of this and other commerical nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extra-territorial reach of national laws, nor from the abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own.... [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen, 345 U.S. at 581-82, 73 S.Ct. at 927-28 (footnotes omitted). All of this cautionary language in Lauritzen obviously applies with equal force in the *forum non convehniens* context.

Twenty years later the Supreme Court was still chiding the lower courts about their tendency to accept admiralty jurisdiction over everything. Our court

had refused to enforce a choice-of-forum clause in a contract between sophisticated international maritime businesses. The Court rebuked us:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... [I]n an era of expanding, world trade and commerce, the absolute aspects of the doctrine [that choice-of-forum clauses are unenforceable] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 9, '92 S.Ct. 1907, 1912, 32 L.Ed.2d 519 (1972).

The *Lauritzen* and *Zapata* cases are two examples of a clear national policy of judicial self-restraint in the maritime field. Federal maritime law

tries to implement a policy balanced between allowing aliens to sue in our courts and under our laws when appropriate while rejecting attempts to make the United States the forum and lawmaker for the world's maritime defendants. The Texas "open-forum" law, on the other hand, could make one of the united states an open world forum, and with that would follow distorting effects on international commerce and regulation. Ultimately Sect. 71.031, if Madam Choo's interpretation is an accurate prediction of Texas law, could hardldy fail to affect foreign relations, as the Texas courts entertain actions by aliens against aliens for occurrences on alien soil or waters in derogation of the judicial and administrative power of the domicilliary countries and the place of the wrong.

The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law. Texas cannot be allowed to thwart that policy in a maritime case brought to its courts.[16]

---

16. *Forum non conveniens* is sometimes viewed as a discretionary doctrine that focuses on the forum's own interest in the matter. The idea is that each forum must look primarily to its own interests to decide whether it is an inconvenient place to try a pending lawsuit. From this premise, Madam Choo concludes that federal law should not control the Texas courts' determination of convenience or inconvenience in a given case. We agree. Federal courts may not enjoin or even second-guess a state court that has exercised its discretion to either retain or dismiss a maritime case after applying the maritime *forum non conveniens* law, whatever the result. Our argument goes to whether the Texas *legislature* should be allowed to prohibit its courts from performing their discretionary duties under the federal maritime law. It is the peculiar *res judicata* posture of this case that absolutely forecloses further consideration of it by the Texas state courts.

Not long ago, Congress amended the Jones Act to deny a cause of action to foreign workers injured while engageing in the offshore exploration or development of minieral or energy resources in foreign waters, unless the person bringing the action is able to establish that there is no other remedy available. *See* 46 U.S.C. Sect. 688(b) (as amended by Pub.L.No. 97-389, 96 Stat. 1949, 1955, Sect 503(a)(1982)). The legislative history makes it clear that Congress intended to codify judicial decisions dismissing claims under the Jones Act by foreign offshore workers under the doctrine of *forum non conveniens*. *See Vaz Borralho v. Keydril Co.*, 710 F.2d 207, 210-11 (5th Cir.1983). We assume that no one would dare argue that the Texas courts could refuse to dismiss a Jones Act claim

barred by Sect. 688(b) under the authority of Sect. 71.031. Why should the result be any different when the federal maritime law at issue is judge-made rather than statutory?

H. Conclusion

Today we must decide whether Texas may apply Sect. 71.031 in maritime cases brought in her courts. The district court's injunction of the state proceeding is proper if and only if the original federal court determination of the parties' rights and obligations is *res judicata*; and the federal judge is *res judicata* if and only if the Texas courts are *not* free to apply their "open-forum" law to actions that come within the maritime jurisdiction of the federal courts. Our concern, however, is broader than the narrow facts of this case.

In *Kassapas v. Akron Shipping Agency, Inc.*, 485 So.2d 565 (La.Ct.App. 5th Cir.), *writ denied*, 488 So.2d 203 (La. 1986), a Louisiana Court of Appeal reversed a trial court's dismissal of a maritime case on the ground of *forum non conveniens*. The plaintiffs originally sued for wrongful death under the Jones Act and the general maritime law of the United States in the federal district court for the Southern District of New York. The district court noted that the plaintiffs and the plaintiffs' decedents were Greek, the owner of the vessel was a Liberian corporation with its principal place of business in Greece, the manager of the vessel was a Greek corporation, the charterer was a Panamanian corporation, and the deaths were alleged to have occured in the port of Leningrad in the Soviet Union. The

district court held that it was a *forum non conveniens* and conditionally dismissed the case. *Kassapas v. Akron Shipping Agency, Inc.*, 578 F.Supp. 400 (S.D.N.Y.), *aff'd mem.* 738 F.2d 418 (2d Cir.1984).[17] After the dismissal by the federal district court, the plaintiffs found the vessel in Jefferson parish, and brought the identical claims in the state courts of Louisiana. The trial court dismissed the action as *forum non conveniens*. The state Court of Appeal reversed, citing dubious federal authority for the proposition that *forum*

---

17. As of the date of this opinion, none of the citation services - Shepard's, Westlaw, or Lexis - shows the Second Circuit's affirmance of this case. The Second Circuit clerk's office has confirmed that the unpublished opinion of May 23, 1984 (Docket No. 84-7196, listed at 738 F.2d 418), affirmed the February 8, 1984, Memorandum and Order (Docket No. 82 Civ. 6954 (MP), reported at 578 F.Supp. 400).

non conveniens is "procedural",[18] and holding that the doctrine is not recognized in Louisiana law and could *not be applied by the trial court. As we have shown, Kassapas* was plainly wrong. We are concerned that two major maritime states in this Circuit appear to be willing to disregard federal *forum non conveniens* doctrine in maritime cases brought to their courts.

For all these reasons, we reject Madam Choo's argument that Sect. 71.031

---

18. The *Kassapas* court cites *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3 (1950), for the proposition that *forum non conveniens* is a "procedural" device. *Mayfield* held that states were not compelled by federal law to retain jurisdiction over FELA cases that would be dismissed under an impartially applied *forum non conveniens* doctrine of state law.

fundamentally alters *forum non conveniens* in this case and that the deferral of her claims to Singapore by the federal court is not *res judicata* in a Texas state court. Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime case. *Accord Couch v. Chevron International Oil Co.*, 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.]1984 writ ref'd, n.r.e.); *but cf. Couch v. Chevron International co.*, 682 S.W.2d 534 (Tex.1984); *contra Kassapas*, 485 So.2d at 567. Therefore, we affirm the district court's injunction of the state

court proceeding as *res judicata* on the ground that Texas may not apply its "open-forum" law in a maritime case and there is no other new issue to be litigated. It is time for this litigatio to come to an end in the United States and to return to Singapore, where it belongs. Because of the complexity of this case, the sanctions against Mandam Choo's attorneys are DISSOLVED, but the issuance of the permanent injunction by the district court is AFFIRMED.

CLARK, Chief Judge, concurring:

I concur in the result reached by Judge Gee because it upholds the district court's order, the pertinent part of which is set out in the margin.[1]

---

1. "ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks, be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against

The federal court heard the parties, considered the matters before it and reached a decision that the contested issues should be litigated in Houston in the interest of justice. That decision was not appealed and became final and binding as between the parties. All proceedings in that case were closed. The district court did no more than order *parties* that had been subject to its jurisdiction to give effect to the

---

Exxon corporation and/or Esso Tankers, Inc., in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them."

adjudication of an issue raised by and finally decided as between them. The jurisdiction that court undeniably had at the time the adjudication was made confers the inherent power to effectuate that final decision. I recognize that injunctions addressed to paties can impact on courts in which they litigate and that federal law limits such intrusions. 28 U.S.C. Sect. 2283. However, the exercise of the power to effectuate a judgment is an express exception to the limiting force of Sect. 2283. More importantly, this case presents no reason to draw courts or court systems into what is essentially nor more than an attempt by a dissatisfied litigant to thwart a binding order she does not like.

Today's dispute does not implicate Texas courts or Texas law. It could be

resolved entirely within the perimeters of the federal forum. Since Choo has acted to violate a final, binding order of the federal court, entered at a time when both parties were subject to its jurisdiction, that court can order them to end the violation. The fact tha' Texas courts might not use the same principles of adjudication furnishes only the condition that permits the violation to occur. Texas may permit, but it surely does not require, that Choo use its courts. No vested right to try this case in a Texas court in Houston is impaired by the federal forum's protection of its judgment. There is no need to raise or resolve questions of sovereignty, preemption, comity or *res judicata*.

Assuming *arguendo* that the power of this court to protect or effectuate its

final judgment somehow does not extend to proscribing subsequent, negating acts of parties over whom it had jurisdictin, I agree with Judge Gee that the maritime nature of the order enetered in the present controversy would preempt the inconsistent exercise of state court jurisdiction.

REAVLEY, Circuit Judge, dissenting.

It is for the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination. Texas law may permit the *Choo* case to be entertained without regard to any issue resolved by the federal court. This court is not entitled to say otherwise, though my colleagues do just that.

Contrary to what Chief Judge Clark says, Choo has not violated a final,

binding order of the federal court. The court merely dismissed her case, without prejudice, for *forum non conveniens* reasons. The court did not adjudicate Choo's right to bring her action in Texas state courts.

The majority are prepared to announce a bold new rule of preemption and to nullify the Texas open forum law for admiralty cases. If that be good law, this is not the time or place to declare it. I would prefer that the Texas courts decide Texas law, and that another court, preferably the Supreme Court, after full consideration, decide whether to sweep so far.

The Court tells us that "[a]ny doubts as to the propriety of a federal injunction against state court proceediuld be resolved in favor of

permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S.ct. 1739, 1748, 26 L.Ed.2d 246 (1970). My colleagues fail to heed. I dissent.

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, ET AL.,
Petitioners

v.

EXXON CORPORATION, ET AL.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES PATRICK COONEY
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Respondents

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition in the Court Below.	2
B. Facts of the Case.	5
ARGUMENT	6
Introduction	6
I. THE *ZIPFEL* AND *CHOO* CASES ARE NOT NECESSARILY IN CONFLICT.	7
II. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.	13
A. Injunction Below Was Not Predicated on a Theory of Federal Preemption.	13
B. Domestic *Forum Non Conveniens* Cases are Distinguishable.	14
CONCLUSION	15
CERTIFICATE OF SERVICE	17

LIST OF AUTHORITIES

CASES	Page
Angel v. Bollington, 330 U.S. 183 (1947)	11
Atlantic Coast Line v. Brotherhood of Railway Workers, 398 U.S. 281 (1970)	7, 13
Bell v. Hood, 327 U.S. 678 (1946)	8, 11
Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982)	8, 16
Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir. 1983)	3
Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1985)	4
Exxon Corporation v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987)	2
Federated Department Stories, Inc. v. Moite, 452 U.S. 394 (1981)	8, 11
Golden v. Pacific Maritime Ass'n, 786 F.2d 1425 (9th Cir. 1986)	10
Harper Plastics v. Amoco Chemical Corp., 657 F.2d 939 (7th Cir. 1981)	11
Kassapas v. Akron Shipping Agency, Inc., 485 S.W.2d 565 (La. Ct. App., 5th Cir.), *writ denied*, 488 S.W.2d 203 (La. 1986), *cert. denied*, ____U.S.____, 93 L.Ed.2d 372 (1987)	16
McClelland Engineering v. Munusamy, 784 F.2d 1212 (5th Cir. 1986)	16
Midkiff v. Torn, 725 F.2d 502 (9th Cir. 1984)	10
Missouri v. Mayfield, 340 U.S. 1 (1950)	15
Offshore Logistics v. Tallentire, 471 U.S.____, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986)	16, 17
Parsons v. Chesapeake Railway Co., 375 U.S. 371 (1963)	7, 15
Pastewka v. Texaco, Inc., 565 F.2d 851 (3rd Cir. 1977)	15
Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983)	8, 16
Zipfel v. Halliburton, 820 F.2d 1438 (9th Cir. 1987)	*Passim*

UNITED STATES STATUTES	
28 U.S.C. § 1651(a)	2, 8
28 U.S.C. § 2283	2, 8

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 12(b)(6)	8, 11
Rule 41(b)	11
Rule 56	8, 11
Rule 60(b)	3

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, ET AL.,
Petitioners

v.

EXXON CORPORATION, ET AL.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices of the Supreme Court of The United States:

COME NOW Exxon Corporation and Esso Tankers, Inc.,* Respondents (sometimes referred to jointly as "Exxon"), and file this their Brief in Opposition to the Petition for Writ of Certiorari filed herein and would respectfully show to the Court as follows:

* Exxon Corporation has numerous subsidiaries and affiliates. A complete listing of these entities will be provided under separate cover. Esso Tankers, Inc. is a wholly, but indirectly, owned subsidiary of Exxon Corporation.

STATEMENT OF THE CASE

The Petitioners Chick Kam Choo and her attorneys Benton Musslewhite and Joseph C. Blanks seek review of a decision of the United States Court of Appeals for the Fifth Circuit rendered on May 21, 1987, affirming the judgment of the United States District Court for the Southern District of Texas permanently enjoining the Petitioners pursuant to Sections 1651(a) and 2283 of Title 28, U.S.C., from prosecuting or commencing any actions against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977. The opinion of the Fifth Circuit is published under the style of *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987).

The central issue presented for review is whether the dismissal under the doctrine of *forum non conveniens* of a maritime action brought by a foreign claimant for the death of a foreign maritime worker occurring outside of the United States precludes litigation of the same claim in a state court and thus supports an injunction prohibiting such litigation under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

A. Course of Proceedings and Disposition in the Court Below.

On March 14, 1978, Chick Kam Choo filed a civil action in the United States District Court for the Southern District of Texas styled CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, Deceased, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR,

LEONG CHOY FONG, and LEONG CHOY TAN v. EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC., in which a claim to recover for the wrongful death of Leong Chong was asserted.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in the civil action, holding, *inter alia*, that Singapore law applied, that Plaintiff's decedent was not a Jones Act seaman as a matter of law, and that the action be dismissed under the maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore.

Chick Kam Choo did not file a timely appeal from the Court's Final Judgment of July 31, 1980, but acting through her attorney, Benton Musslewhite, filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and a Notice of Appeal was filed. The district court's denial of relief under Rule 60(b) was affirmed in *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983). After a Petition for Rehearing and Rehearing En Banc were denied by the Fifth Circuit, Chick Kam Choo filed a Petition for Writ of Certiorari with this Court, which was denied on October 3, 1983. 464 U.S. 826 (1983).

On January 6, 1984, Chick Kam Choo, again acting through her attorney Benton Musslewhite, filed an Original Petition in the 270th Judicial District Court of Harris County, Texas, which was substantially identical to the Complaint filed in 1978 in the Southern District of Texas. The cause filed in state district court was removed to the Southern District of Texas, Houston Division, on

grounds of diversity of citizenship and alienage jurisdiction. The district court denied Chick Kam Choo's motion to remand the case, and granted Exxon's Motion to Dismiss. Notice of Appeal was field on June 12, 1984 and on July 8, 1985, the Fifth Circuit Court of Appeals reversed the district court, holding that the necessary subject matter jurisdiction was lacking and vacated the district court's judgment with instructions that the case be remanded to state court. *Chick Kam Choo v. Exxon,* 764 F.2d 1148 (5th Cir. 1985). The Order remanding the case was entered by the district court on August 16, 1985.

The Petitioners Benton Musslewhite and Joseph C. Blanks are the attorneys of record for Chick Kam Choo in the cause pending in the 270th Judicial District Court of Harris County, Texas. The claims asserted by the Original Petition filed in the state cause are substantially identical to the claims asserted in the original federal action which was dismissed in 1980. No attempt has been made to institute an action in the Republic of Singapore or in any other jurisdiction outside of the United States.

On February 11, 1986, the instant action was commenced in the Southern District of Texas. Exxon filed a Motion for Summary Judgment and Application for Permanent Injunctive Relief, which was granted by the Court on May 15, 1986. The judgment of the district court enjoining the Petitioners from prosecuting or commencing any action against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977 was affirmed by the Fifth

Circuit on May 21, 1987 and rehearing *en banc* was denied on June 24, 1987.

B. Facts of the Case.

The civil action decided by the Southern District of Texas in 1980 and the cause now pending in the 270th Judicial District Court of Harris County, Texas, are essentially identical claims seeking to recover for the death of Leong Chong, who was killed while working onboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs at a shipyard in Singapore during March, 1977. The M/V ESSO WILHELMSHAVEN was at all relevant times a Liberian flag vessel owned by Esso Tankers, Inc. and operated by Exxon International, an unincorporated division of Exxon Corporation. Exxon and Esso Tankers were the Defendants in the original federal action and are the Defendnants in the cause pending in the Texas court. Thus, the parties in the two actions are identical.

In the Original Complaint, filed in the Southern District of Texas, the Plaintiff Chick Kam Choo, acting both individually and in representative capacities, sought to recover for the death of her husband Leong Chong under the Jones Act, the general maritime law, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, and the wrongful death statutes of the State of Texas. Exxon filed a Motion for Partial Summary Judgment and to dismiss the action under the maritime doctrine of *forum non conveniens.* After extensive briefing and after hearing the arguments of both sides, the district court explicitly held that American law did not apply and granted Exxon's Motion for Partial Summary Judgment as to the claims presented

under the Jones Act, Death on the High Seas Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law of the United States. The Court granted a conditional dismissal of the foreign law claims on the grounds of *forum non conveniens*, provided that Exxon consented to the jurisdiction of the appropriate Singapore court. No attempt to commence an action in the courts of Singapore was made by Chick Kam Choo or her attorneys.

ARGUMENT

Introduction

In urging the Court to grant a Writ of Certiorari in this case, the Petitioners rely on three principal grounds: an alleged conflict between the Fifth Circuit in this case and the Ninth Circuit in the case of *Zipfel v. Halliburton*, 820 F.2d 1438 (9th Cir. 1987); an alleged conflict between the Fifth Circuit's opinion and cases of this Court holding that preemption of an area by federal law does not justify a federal injunction of a state court action; and an alleged conflict with cases of this Court holding that a *forum non conveniens* dismissal cannot have a preclusive effect sufficient to support injunctive relief under the relitigation exception of the Anti-Injunction Statute.

As will be demonstrated below, the conflicts relied upon by the Petitioners are for the most part illusory. The Ninth Circuit has pending before it in *Zipfel* a petition for rehearing and the factual and procedural situation with which *Zipfel* deals is in several respects different from the situation dealt with by the Fifth Circuit in *Chick Kam Choo*. Although the *Zipfel* decision,

as it now stands, can be interpreted as being in conflict with the Fifth Circuit's position in *Chick Kam Choo* on the relitigation injunction point, it is also susceptible to interpretations that may eliminate the conflict. The Petitioners also attempt to find a conflict between the holding below and cases such as *Atlantic Coast Line v. Brotherhood of Railway Workers*, 398 U.S. 281 (1970), by misreading the decision below as being based entirely on the preemption of state law by federal law in a maritime case, rather than the preclusive effect of the prior federal judgment. Finally, cases such as *Parsons v. Chesapeake Railway Co.*, 375 U.S. 371 (1963), dealing with the nonpreclusive effect of domestic *forum non conveniens* dismissals are clearly distinguishable from *Chick Kam Choo*.

I. THE *ZIPFEL* AND *CHOO* CASES ARE NOT NECESSARILY IN CONFLICT.

Chick Kam Choo involves a wrongful death claim arising out of the death of a ship repairer aboard an ocean-going vessel that was undergoing repairs in Singapore. The claim was brought in the Southern District of Texas under the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, the general maritime law and the laws of the State of Texas against the vessel owner, Esso Tankers, Inc., and the vessel operator, Exxon Corporation. In 1980, summary judgment was entered holding that the law of the Republic of Singapore controlled and dismissed the claims brought under the Jones Act, Longshore and Harbor Workers' Compensation Act, Death on the High Seas Act, and the general maritime law of the United States. The case was then dismissed under

the maritime doctrine of *forum non conveniens* for further proceedings in Singapore. No appeal was taken from the Final Judgment.[1] In 1984, Madame Choo and her attorneys, alleging substantially identical theories, filed "Plaintiff's Original Petition" based upon the same cause of action and same nucleus of operative facts in state district court in Houston.[2] Exxon sought injunctive relief in an independent action in federal district court under the All Writs Statute, 28 U.S.C. § 1651(a), and the relitigation exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, to vindicate its position under the prior federal judgment by enjoining further litigation of the claim in the United States. It is the Fifth

1. Under the Fifth Circuit precedent, the choice of law determination by the federal district court is of key importance. As in *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 390-91 (5th Cir. 1983), and *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), no claim for relief under foreign law was stated in Petitioner's federal pleadings. As the Fifth Circuit succinctly stated in *Vaz Borralho*:

> Because the appellants asserted claims under American law only, once the district court determined that American law did not apply, "it could have properly dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, and, if deposition and affidavits were considered [as they were in this case] have granted a summary judgment under Rule 56." *Chiazor*, 648 F.2d at 1028 n.7. [citing additional authority]

696 F.2d at 391. Mr. Musslewhite was counsel of record for Plaintiff in both *Vaz Borralho* and *Chiazor*.

Dismissals under Rule 12(b)(6) and Rule 56 are clearly *res judicata* under well settled precedent. *Federated Department Stories, Inc. v. Moite*, 452 U.S. 394 (1981); *Bell v. Hood*, 327 U.S. 678 (1946).

2. Because Petitioners attempted to plead new theories on the same cause of action as had been dismissed under a final, albeit conditional judgment, the additional theories were precluded by doctrines of merger and bar. Claim splitting does not afford a defeated litigant a trial de novo upon the same cause of action.

Circuit's affirmance of the permanent injunction granted by the district court prohibiting relitigation in state court for which review is being sought.

While procedurally similar to *Choo*, the *Zipfel* case presents a slightly different factual situation. *Zipfel* involves claims for personal injury and death arising out of an airplane crash at an airport in Indonesia in 1981. The claimants and claimant's decedents in *Zipfel* were offshore oil workers employed aboard an offshore drilling vessel and at the time of the crash were being transported to the vessel. In *Zipfel* the trial court held that the Jones Act did not apply to the foreign claimants, but did to the American claimants, and dismissed the entire case conditionally under the doctrine of *forum non conveniens* for further proceedings in either Singapore or Indonesia. A substantially identical action was commenced in the courts of the State of Texas more or less contemporaneously with the federal action. Because of the existence of the pending Texas action, the defendants requested the federal district court in San Francisco to grant a permanent injunction prohibiting further litigation of the dismissed claims in state court as part of their relief in the main action.

The analytical approaches taken by the two Courts of Appeal to the relitigation injunction issue differ markedly. Judge Gee, speaking for the Fifth Circuit, began with the proposition that even though American substantive law did not control the claims of Madame Choo, the claims that remained after the district court's *forum non conveniens* dismissal were admiralty tort claims. 817 F.2d at 309. That being the case, he concluded after a careful and thorough consideration of the preemptive effect of federal law in admiralty and maritime matters that the

state court was bound to follow federal maritime law, including the maritime doctrine of *forum non conveniens*. Given the absence of different objective facts, the state court was bound by the federal court's judgment dismissing the case on the basis of *forum non conveniens*, notwithstanding the fact that Texas in all likelihood does not recognize the *forum non conveniens* concept in its own jurisprudence. As far as the Fifth Circuit was concerned, the case turned on direct estoppel:

> We conclude that once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, that issue may not be relitigated. 817 F.2d at 314.

In *Zipfel*, the Ninth Circuit affirmed the trial court's choice of law determination and *forum non conveniens* dismissal (except for those claims controlled by U.S. law), but vacated the injunctive relief granted by the trial court to prevent the claimants from continuing to prosecute their claims in the Texas courts. In so doing, the Ninth Circuit virtually ignored any possible *res judicata* effect the *forum non conveniens* dismissal or the underlying factual findings and choice of law determination might have even though its cases acknowledge that the relitigation exception to the Anti-Injunction Act allows federal courts to enjoin state court proceedings to protect the *res judicata* effect of their judgments. *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1427 (9th Cir. 1986), *citing Midkiff v. Torn*, 725 F.2d 502, 504 (9th Cir. 1984). Instead, the Ninth Circuit focused on language in these cases that a relitigation exception was available only if the federal judgment was *on the merits*,

and without analysis or authority concluded that no judgment on the merits had been rendered since the defendants had only prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seaman's lawsuits in a United States district court. 802 F.2d at 1449. The Court also seemed to ignore the fact that the *forum non conveniens* dismissal transcended narrow parochial concerns regarding the relative convenience of available domestic forums and constituted a determination as to whether *any* court in the United States should entertain such a cause.

While the meaning of a "judgment on the merits" seems to have become obscure, it generally is taken to mean that the judgment has some preclusive or *res judicata* effect. Fed. R. Civ. P. 41(b). It is well settled that a Rule 12(b)(6) or Rule 56 dismissal has a *res judicata* effect. *Federated Department Stores, Inc. v. Moite*, 452 U.S. 399 (1981); *Angel v. Bollington*, 330 U.S. 183 (1947); *Bell v. Hood*, 327 U.S. 678 (1946). *See, Harper Plastics v. Amoco Chemical Corp.*, 657 F.2d 939, 943 (7th Cir. 1981). Under the Fifth Circuit's analysis a judgment dismissing a foreign litigant under the maritime doctrine of *forum non conveniens* has the preclusive effect sufficient to prevent the continued litigation of the claim in the United States and on that basis can be said to be "on the merits." The Ninth Circuit in *Zipfel* never addresses the issue.[3]

A petition for rehearing has been filed with the Ninth Circuit on the relitigation injunction point and the Court

3. Under the Ninth Circuit approach, the dismissal of a foreign seaman's claim under the doctrine of *forum non conveniens* for resolution outside the United States is a meaningless exercise of judicial effort since the judgment has no preclusive effect.

has requested a response. Thus, it is conceivable that the Ninth Circuit will reconsider its position and elimiate any theoretical conflict that may exist with the Fifth Circuit.

Even if the Ninth Circuit does not reconsider its position on rehearing, there is a question of whether the *Zipfel* decision actually creates a conflict between the circuits as to whether the dismissal on *forum non conveniens* grounds of a maritime action by a federal court for litigation in a foreign forum precludes the relitigation of the same claims in a state court. The *Chick Kam Choo* case involved the wrongful death of a foreign shipyard worker on a vessel lying afloat in a Singapore harbor. The *Zipfel* case involves an air crash on land which resulted in the death and injuries of offshore oil workers who were being transported to a drilling vessel located off Indonesia. In *Chick Kam Choo,* it is clear that the claimant retained an admiralty tort claim, albeit a claim controlled by Singapore law and assertable only outside the United States. 817 F.2d at 309, 321-325. The question of whether any admiralty tort claims remained in *Zipfel* after the dismissal of the Jones Act claims was never addressed by the Ninth Circuit in its opinion. To the extent that the claimants in *Zipfel* retained a residuum of non-maritime claims after the dismissal of their Jones Act claims, the holdings in the two cases with regard to the relitigation injunction are distinguishable.

As Judge Gee pointed out below, if maritime claims are dismissed by a federal court under the maritime doctrine of *forum non conveniens* for litigation in a nation other than the United States, any subsequent litigation of such claims in a state court, including the issue of the *forum non conveniens* dismissal, must be controlled by federal maritime law. Implicit in this is the conclusion that

if the claims dismissed by the federal court are not maritime in nature, but involve claims over which a state court can exercise independent, concurrent jurisdiction with the federal courts, the state court would not necessarily be bound by federal maritime law. To the extent *Zipfel* is read as leaving non-maritime claims remaining after the dismissal of the Jones Act claims, the conflict between *Zipfel* and *Chick Kam Choo* is not sufficiently direct to justify the granting of a Writ of Certiorari.

However, if the residuum of claims in both *Choo* and *Zipfel* consists of admiralty tort claims, there appears to be a direct conflict between the two decisions and the nature and extent of such conflict must be examined to determine if certiorari is appropriate. It is impossible to make this examination until the Ninth Circuit has acted on the pending petition for rehearing.

II. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Injunction Below Was Not Predicated on a Theory of Federal Preemption.

Petitioners argue that the decision below is in conflict with the decisions of this Court holding that there is no exception to the Anti-Injunction Act to allow federal courts to enjoin state court proceedings dealing with "an area preempted by federal law." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 294 (1970). Petitioners' argument, however, is based on a distortion of the decision below. The permanent injunction granted by the district court which is at issue here is expressly based on the relitigation exception of Section 2283. The foundation of the injunction was the final judgment entered by the federal court in 1980 dismissing all claims

and theories under Chick Kam Choo's federal pleadings and dismissing those not otherwise adjudicated for resolution under the laws and in the courts of the Republic of Singapore pursuant to the maritime doctrine of *forum non conveniens*. The injunction was not based on the notion that federal law preempts state law in admiralty and maritime matters and that as a result federal courts have the right to prevent state courts from hearing admiralty and maritime matters. Such an approach would fly into the teeth of the Savings to Suitors Clause. Preemption as a concept became important in the decision below as a means of determining the preclusive effect of the maritime *forum non conveniens* dismissal contained in the prior federal judgment. An injunction to prevent the relitigation of an issue can issue only if there is an underlying judgment that would preclude another tribunal from deciding the issue again and perhaps differently. To make this determination, the appellate court necessarily had to decide if the state court was free to resolve the *forum non conveniens* issue differently from the federal court. To do so, the court of appeals properly considered the relationship between federal and state law as applied to maritime cases. The preemption cases cited by the Petitioners are in no way directed to the articulation of a preemption test in the maritime field (or any other field) to enable courts to determine the preclusive effects of federal judgments. Therefore, they do not conflict with the Fifth Circuit's decision in *Choo*.

B. Domestic *Forum Non Conveniens* Cases are Distinguishable.

Petitioners argue that the *Choo* decision is in conflict with decisions of this Court, as well as lower courts, holding that *forum non conveniens* determinations are

procedural and without *res judicata* effect, relying on *Parsons v. Chesapeake Railway Co.*, 375 U.S. 371 (1963) and *Missouri v. Mayfield*, 340 U.S. 1 (1950), among others. These cases are distinguishable and in no way inconsistent with the application of the direct estoppel by judgment rule employed by the Fifth Circuit below. *See Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). *Parsons*, for instance, was an FELA case subject to the independent and concurrent jurisdiction of both state and federal courts. As Judge Gee points out below, in such a situation each court system is free to apply its own approach to *forum non conveniens*. 817 F.2d at 319. Moreover, the *Parsons* and *Mayfield* cases, as well as the other cases relied on by the Petitioners, all involve purely domestic cases with all of the alternative forums located in the United States. The range of objective facts that are relevant in a domestic *forum non conveniens* context, such as docket congestion, are much broader and more subjective than the factors that govern international *forum non conveniens* determinations. There is a difference of kind rather than degree between a determination as to which of two available courts in this country should adjudicate a domestic controversy and a determination of whether a claim brought by foreign claimants regarding an occurrence which took place outside of this country should be adjudicated in our courts.

CONCLUSION

Petitioners complain that if the decision below is allowed to stand, it will affect any case which a maritime plaintiff files in state court in that the state court will be forced to apply federal maritime law and, in the proper case, federal maritime *forum non conveniens* principles. (Petition, p.

23) The fact that state courts are bound to apply federal maritime law in maritime cases brought before them is hardly a novel idea. *See Offshore Logistics v. Tallentire*, 471 U.S.____, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). However, Petitioners' concern does point up the significance of the Fifth Circuit's decision in *Chick Kam Choo*. Over the last several years, numerous claims have been asserted in our federal courts by foreign maritime claimants seeking to recover for personal injuries and deaths resulting from maritime activities outside the territorial waters of the United States. In response, the various courts of appeal have refined traditional maritime *forum non coveniens* concepts in an effort to determine which of these foreign maritime claims should be returned to the countries in which they arose and which should be resolved in the United States. *See e.g., Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *McClelland Engineering v. Munusamy*, 784 F.2d 1212 (5th Cir. 1986). However, many foreign claimants are not returning to the appropriate national forum after being directed to do so by our federal courts. Instead they are more and more turning to state courts and particularly state courts that refuse to recognize the doctrine of *forum non conveniens*. E.g. *Kassapas v. Akron Shipping Agency, Inc.*, 485 S.W.2d 565 (La. Ct. App., 5th Cir.), *writ denied*, 488 S.W.2d 203 (La. 1986), *cert. denied*, ____U.S.____, 93 L.Ed.2d 372 (1987). We are thus faced with the possibility of the development of a dual system of maritime law in which similar claims are dealt with in fundamentally different ways by our federal and state courts. The decision below, when taken together with this Court's recent decision in

Tallentire, clearly stands for the proposition that the matritime law of the United States is to applied consistently and uniformly, regardless of whether the jurisdiction of our state or federal courts are invoked. For this reason, the decision in *Exxon Corporation v. Chick Kam Choo* should be left undisturbed.

Respectfully submitted,

By:

JAMES PATRICK COONEY
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Respondents

Of Counsel:
ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I hereby certify that the Petition for Writ of Certiorari was received by me through the United States mail on September 24, 1987 and that I have this day served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002 and Joseph C. Blanks, 909 Laurel, Beaumont, Texas 77701, attorneys for Petitioners by placing the same in the United States mail, Certified Mail, Return Receipt Requested, in a properly addressed envelope addressed to Mr. Musslewhite at the above address on this 26th day of October, 1987.

James Patrick Cooney

JAMES PATRICK COONEY

Sworn to and subscribed to before me the undersigned authority, this _____ day of October, 1987.

_____

Notary Public, in and for
The State of Texas

My Commission Expires: _____

Supreme Court, U.S.
FILED
JAN 11 1988
CLERK

No. 87-505

In The

Supreme Court of the United States

October Term, 1987

CHICK KAM CHOO, *et al.*,

Petitioners,

vs.

EXXON CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

Benton Musslewhite
Counsel of Record
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

Joel I. Klein
David Boyd
David A. Bono
Onek, Klein & Farr
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Attorneys for Petitioners

James Patrick Cooney
Counsel of Record
Royston, Rayzor,
Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorney for Respondents

Petition for Writ of Certiorari filed September 21, 1987
Certiorari granted November 16, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

		Page
1.	Docket Entries	1
2.	Plaintiffs' Original Complaint, H-78-477	3
3.	Motion of Defendants for Partial Summary Judgment and to Dismiss—Forum Non Conveniens, H-78-477	8
*4.	Excerpts of Defendants' Brief in Support of Motion for Partial Summary Judgment and to Dismiss Under the Doctrine of Forum Non Conveniens, H-78-477	14
5.	Memorandum and Recommendation of Magistrate, H-78-477	27
6.	Order of Dismissal, H-78-477	34
7.	Final Judgment, H-78-477	36
8.	Plaintiff's Original State Court Petition, No. 84-00125	37
*9.	Petition for Removal, H-84-497	45
*10.	Motion of Plaintiffs to Remand Cause to State Court, H-84-497	50
*11.	Response of Exxon Corporation to Plaintiff's Motion to Remand, H-84-497	66
*12.	Exxon's Motion to Dismiss and for the Imposition of Sanctions, H-84-497	77
*13.	Plaintiffs' Response to Defendants' Motion to Dismiss and Defendants' Motion for Imposition of Sanctions, H-84-497	82
*14.	Order and Final Judgment, H-84-497	86
*15.	Order of Remand Pursuant to Fifth Circuit Mandate, H-84-497	88
*16.	Final Judgment, H-84-497	89

---

* With respect to the documents marked with an asterisk, the respondents do not question their accuracy but would not agree that they were necessary for the appeal and thus should be included in the joint appendix.

TABLE OF CONTENTS—Continued

		Page
17.	Complaint for Injunctive Relief, H-86-606	90
18.	Respondents' Motion to Dismiss, H-86-606	96
19.	Plaintiffs' Opposition to Defendants' Motion to Dismiss, H-86-606	100
20.	Motion for Summary Judgment and Application for Permanent Injunctive Relief, H-86-606	104
21.	Respondents' Response to Motion for Summary Judgment and Application for Permanent Injunctive Relief, H-86-606	110
22.	Injunction and Final Judgment, H-86-606	118

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/11/86	1	ORIGINAL COMPLAINT, for INJUNCTIVE RELIEF, filed.
2/11/86		SUMMONS (3) issued to defts.
2/26/86		RETURN OF SUMMONS ISSUED to the following, filed, jgm DK 2/27/86
	2	Joseph Blanks served personally on Feb. 17, 1986
	3	Benton Musslewhite served personally on Feb. 13, 1986
	4	Chick Kam Choo through Benton Musslewhite, served personally on Feb. 13, 1986.
3/ 7/86	5	RESPONDENTS' MOTION TO DISMISS, filed. ryb dkt'd 3/11/86 M/D 3/24/86, by clerk
3/31/86	6	Pltfs' OPPOSITION to defts' Motion to Dismiss, filed. db dkt'd 4/01/86
4/28/86	7	(NWB) ORDER, filed. Parties ntf'd. jr Hearing set for May 15, 1986, at 2:00 p.m. dkt'd 4/30/86
5/ 7/86	8	Petitioners' MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR PERMANENT INJUNCTIVE RELIEF, filed. jr M/D June 2, 1986, by counsel. dkt'd 5/13/86
5/15/86	9	Respondents' RESPONSE to Motion for Summary Judgment and Application for Permanent Injunctive Relief, filed. jr dkt'd 5/16/86

DATE NR. PROCEEDINGS

5/15/86 10 (NWB) INJUNCTION AND FINAL JUDGMENT, filed. Parties ntf'd. jr Chick Kam Choo and her attys, Benton Musslewhite and Joseph C. Blanks are permanently enjoined from prosecuting or commencing any causes of action or claims against Exxon Corp and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong. This Injunctive Order is binding upon and applies with equal force to defts, their agents, servants and upon those persons in active consent or participation with them. Pltfs will recover reasonable attys' fees as subsequently determined by the Court along with their costs. dkt'd 5/27/86

6/ 3/86 11 Defts Chick Kam Choo, Benton Musslewhite & Joseph C. Blanks' NOTICE OF APPEAL to Final Judgment entered May 15, 1986, filed.
Rec. 6/9/86 and Dkt'd 6/11/86 mac

6/ 3/86 12 Defts. Chick Kam Choo, Benton Musslewhite & Joseph C. Blanks REQUEST for Transcript of Proceedings, filed.
Dkt'd 6/11/86 mac

6/10/86 Filing & Docketing Fees both paid. (Rcpt. # 3-148908) mac

6/11/86 RECORD ON APPEAL consisting of All Original Papers (1 Vol.) forward to Court of Appeals. mac

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the ESTATE OF LEONG CHONG, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HAR, LEONG CHOY FONG and LEONG CHOY LAN	)	
vs.	)	C.A. No. H-78-477
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFFS' ORIGINAL COMPLAINT

1. Plaintiffs are all resident citizens of Singapore.

2. Defendant, EXXON CORPORATION, may be served by serving its registered agent, Mr. Roy L. Trusty, 900 Bell Street, Houston, Texas 77002.

Defendant, ESSO TANKERS, INC., is a foreign corporation which is doing business in this State within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within this State. Said Defendant operates solely as the alter ego of Exxon Corporation, and may be served by serving the Secretary of State for forwarding to the Defendant at 1351 Avenue of the Americas, New York, New York 10020.

Defendant, EXXON INTERNATIONAL COMPANY, INC., is a foreign corporation which is doing business in

this State within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within this State. Said Defendant operates solely as the alter ego of Exxon Corporation, and may be served by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

3. At all times material hereto, LEONG CHONG was a Jones Act Seaman who was entitled to all of the protections of the Jones Act as enumerated therein. As his Administratrix and/or Representatives, Plaintiffs bring this cause of action under 23 U.S.C. § 1916, without the necessity for prepayment of costs or the necessity of depositing security therefor.

4. This action is brought under the purview of 46 U.S.C. § 688, hereinafter referred to as the Jones Act, and for breach of the general maritime law of the shipowner's duty to maintain a seaworthy vessel. Plaintiffs would also show, in the alternative, that they are entitled to recover under the Death on the High Seas Act and the Wrongful Death Statutes of the State of Texas.

5. At all times material hereto, the deceased, LEONG CHONG, was a crew member of the vessel "ESSO WILHELM-SHAVEN". On or about the 24th day of March, 1977, LEONG CHONG was killed while in the course and scope of his employment aboard the vessel "ESSO WILHELM-SHAVEN".

6. The death of LEONG CHONG was caused solely by the negligence of the Defendants and/or the unseaworthiness of the aforementioned vessel, its master, agents, servants and employees. Plaintiffs would show that the negligence of the Defendants, their master, agents, servants and employees and/or the unseaworthiness of the aforementioned vessel was the sole proximate cause of the death of LEONG CHONG.

7. LEONG CHONG was born on the 12th day of January, 1940, and at the time of his death was a strong and healthy individual providing the sole means of support for his family. CHICK KAM CHOO is the widow of LEONG CHONG, and she has suffered damages and is entitled to be compensated by the Defendants for her issues (sic) in the following respects.

(a) The loss of financial support which she has suffered as a result of the death of her husband.

(b) The loss of the love, care, consortium, society, affection, attention, companionship, comfort, protection and personal guidance which she has suffered as a result of the loss of her husband.

(c) The loss of the monetary value of the household and domestic services which her husband rendered during his lifetime and, in all probability, would have continued to render through the duration of his life.

8. LEONG CHONG and CHICK KAM CHOO were the parents of four minor children. LEONG CHOY WAN was born on the 26th day of August, 1967; LEONG CHOY HAR was born on the 12th day of October, 1969; LEONG CHOY FONG was born on the 3rd day of January, 1972; and LEONG CHOY LAN was born on the 3rd day of January, 1972. CHICK KAM CHOO, in her capacity as legal guardian and next friend of the aforementioned children, would show that such children have been materially dam-

aged through the loss of financial support which their father rendered to them during his lifetime and, in all probability, would have continued to render to them until such time as they gain their majority. In addition, they are entitled to be compensated for the affection, companionship, comfort, protection, love, care, society, guidance and fatherly instruction which they have been deprived of through the untimely death of their father.

9. Furthermore, your Plaintiff, CHICK KAM CHOO, as Administratrix and/or as Representative of the ESTATE OF LEONG CHONG, deceased, brings this action for damages to which the Estate is entitled to recover for the physical pain and mental anguish suffered and sustained by the deceased from the time of the beginning of the physical condition which brought about his death to the time of his death.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that process issue to be served upon the Defendants in the form and manner prescribed by law, requiring the Defendants to appear and answer herein, that on final trial hereof Plaintiffs have judgment against Defendants in the sum of ONE MILLION DOLLARS, together with interest thereon from the date of the accident made the basis of this lawsuit, all costs of court, and all such other and further relief to which they may be entitled in the premises and to which the court believes them deserving, and for which they now pray.

Respectfully submitted,

FRIEDMAN AND CHAFFIN

ORIGINAL SIGNED BY
ROBERT A. CHAFFIN

Robert A. Chaffin
3500 Travis
Houston, Texas 77002
(713) 523-4141

ATTORNEYS FOR PLAINTIFFS

PLAINTIFFS HEREBY REQUEST
A TRIAL BY JURY.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, ETC., ET AL.	)	Filed 3-26-79
VS.	)	CIVIL ACTION NO. H-78-477
EXXON CORPORATION, ET AL.	)	

MOTION OF DEFENDANTS FOR
PARTIAL SUMMARY PUDGMENT AND TO
DISMISS—FORUM NON CONVENIENS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Defendants herein, and move this Court to enter an Order granting Partial Summary Judgment pursuant to Rule 56(d) of the Federal Rules of Civil Procedure dismissing Plaintiff's claim for relief under the Jones Act, 46 U.S.C.A. § 688, the Death on the High Seas Act, 46 U.S.C.A., § 761 *et seq.*, and under the General Maritime Law of the United States and further to dismiss this action under the doctrine of *forum non conveniens*, and for grounds thereof would show to the Court as follows:

I.

This case arises out of the death of a shipyard worker employed by Sembawang Shipyard Limited ("Sembawang") of Singapore, on March 24, 1977, in Singapore aboard the S/T ESSO WILHELMSHAVEN ("Vessel"), a vessel owned by Esso Tankers, Inc. ("ETI") and documented under the laws of the Republic of Liberia. The deceased shipyard worker met his death as the result of

being struck on the head by a piece of metal while engaged in repair work in the Vessel's lower engine room. At the time of his death he was under the supervision and control of Sembawang, which was performing repair work on the Vessel pursuant to a contract with Exxon Corporation, through its unincorporated division Exxon International Company ("EIC"), which managed the Vessel pursuant to a Marine Service Agreement. Sembawang is not a party to this action.

II.

The Jones Act is not applicable to this case and all claims thereunder should be dismissed for the following reasons:

1.

No employer-employee relationship, which is essential to recovery under the Jones Act, existed between Plaintiff's decedent and the Defendants.

2.

Plaintiff's decedent was not within the class of "seaman" entitled to recover under the terms of the Jones Act.

3.

The vessel was not in navigation at the time of the incident resulting in Plaintiff's decedent's death.

III.

The Death on the High Seas Act is not applicable to this case and all claims thereunder should be dismissed because it is undisputed that Plaintiff's decedent met his

death in the Republic of Singapore and not on the "high seas." DOSHA provides a wrongful death remedy only in situations where the deceased met his or her death on the high seas outside of the territorial water of any state or nation. *See, Mobil Oil Corp. v. Higginbotham,* — U.S. —, — S.Ct. —, 56 L. Ed. 2d 581 (1978).

IV.

The General Maritime Law of the United States is not applicable to this case and any claims being asserted thereunder should be dismissed. Because of the lack of substantial contacts between the occurrence giving rise to this action and the United States, the maritime law of the Republic of Singapore, rather than the maritime law of the United States is applicable herein on the basis of the choice of law criteria regularly employed in maritime cases of this nature. *Lauritzen v. Larsen,* 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, *reh. den.,* 359 U.S. 962, 79 S. Ct. 795, 3 L. Ed. 2d 769 (1959). The alleged wrongful act that resulted in the death of Plaintiff's decedent took place in the territorial waters of the Republic of Singapore. The deceased was employed by a Singaporese business concern and engaged in ship repair activities in the Republic of Singapore. The courts of Singapore are accessible to the Plaintiff and provide her with several remedies for the alleged wrongful death of her decedent.

V.

This case should be dismissed under the doctrine of *forum non conveniens* because of the lack of substantial contacts between it and the United States and because a

dismissal on *forum non conveniens* grounds would best serve the convenience of the parties and the ends of justice. In support thereof, Defendant would show:

1.

Plaintiff's decedent met his death in Singapore.

2.

Plaintiff's decedent was a resident of Singapore.

3.

Plaintiff's decedent was employed by a Singaporese business concern engaged in ship repair activities in Singapore.

4.

The courts of Singapore are available to the Plaintiff.

5.

The law of Singapore controls the adjudication of this case.

6.

Almost all of the liability witnesses and all of the damage witnesses reside in Singapore or in Malaysia and are not amenable to the process of this Court.

7.

The cost of obtaining the testimony of willing witnesses will be substantial.

8.

Exxon International, pursuant to its contract with Sembawang Shipyard, Ltd., is to be held harmless by

the Shipyard for any injuries sustained by employees of the Shipyard or its sub-contractors pursuant to contract. Defendant is unable to obtain personal jurisdiction so as to implead either the shipyard or the employer of the deceased to enforce its rights of indemnity in this forum.

9.

The United States has no interest in the resolution of this matter.

10.

The Plaintiff will not be significantly inconvenienced by dismissal.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc., Defendants herein, respectfully request that the Court enter an Order granting Partial Summary Judgment and dismissing the Plaintiff's claims under the Jones Act, the Death on the High Seas Act and the General Maritime Law of the United States and dismiss this action on *forum non conveniens* grounds and grant the Defendants whatever other relief to which they are justly entitled.

Respectfully submitted,

/s/ James Patrick Cooney
James Patrick Cooney
Attorney-in-Charge for Defendants
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on Plaintiff's attorney, Robert A. Chaffin, Esq. of Friedman & Chaffin, 3500 Travis, Houston, Texas 77002, by placing a copy of same in the United States Certified Mail, Return Receipt Requested, in a properly addressed envelope with adequate postage thereon.

This 26th day of January, 1979.

/s/ James Patrick Cooney

Of Royston, Rayzor, Vickery
& Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

CHICK KAM CHOO, Etc. et al., Plaintiff	)	
vs.	)	C. A. NO. H-78-477
EXXON CORPORATION and ESSO TANKERS INC., Defendants	)	

BRIEF OF EXXON CORPORATION
and ESSO TANKERS INC. IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND TO DISMISS UNDER THE DOCTRINE OF
FORUM NON CONVENIENS

Statement of the Case.

This is an action seeking to recover damages for the wrongful death of Leong Chong, a Singapore shipyard worker who met his death on March 24, 1977, in Singapore, as the result of being struck on the head by a piece of metal while engaged in shipyard repair work aboard the S/T ESSO WILHELMSHAVEN ("Vessel"), while the Vessel was undergoing repairs ("Repairs") at the Shipyard of Sembawang Shipyard Ltd. ("Sembawang") in Singapore. (The above deseribed incident will be referred to herein as the "Accident.") Plaintiff seeks to recover under the Jones Act, 46 U.S.C.A. § 688; the Death on the High Seas Act, 46 U.S.C.A. § 761 *et seq.;* the Texas Wrongful Death Statute, Art. 4671, *et seq.*, V.A.T.S., as amended, (Supp. 1978); and the general maritime law of the United States. Defendants Exxon Corporation and Esso Tankers

Inc. have filed a Motion for Partial Summary Judgment and to dismiss under the doctrine of *forum non conveniens.*

The various affidavits filed in support of Defendants' Motions will be cited to herein as "(Berner Aff., ¶ —)" etc. The Notes of Evidence of the Coroner's Inquest held in Singapore regarding Plaintiff's decedent's death will be cited to herein as "(Notes of Evidence, p. —)". Defendants' Interrogatory Answers will be cited to herein as "(Interrogatory Answer No. —)." An Affidavit identifying relevant contracts and business records will be cited to herein as "(Exxon Rec. Aff.)".

Facts.

The Vessel is a steam turbine tanker built in Germany in 1970 and documented under the laws of the Republic of Liberia. (Berner Aff. ¶ 8.) She is of 113,751 gross tons, and has a length of approximately 1,141 feet and a draft of approximately 65 feet. At the time of the Accident and at all times since then, the Vessel has been owned by Esso Tankers Inc. ("ETI"), a corporation existing under the laws of the Republic of Liberia, which is a 100% indirectly owned affiliate of Exxon Corporation. (Interrogatory Answer No. 1) At the time of the Accident and at all times since then the Vessel has been managed by Exxon International Company ("EIC"), pursuant to a Marine Service Agreement between ETI and EIC, the latter being an unincorporated division of Exxon Corporation. (Exxon Rec. Aff.) At all material times the Vessel's officers and unlicensed crew were Italian nationals hired for ETI. (Berner Aff. ¶ 8) The Vessel never called in the United States prior to the Accident. Since that time it has made

one visit to St. Croix in the Virgin Islands in January, 1979. (Exxon Rec. Aff. Ex. IV).

The Vessel was in the Sembawang Shipyard in March of 1977 for drydocking and repair pursuant to a Repair Contract between EIC and Sembawang. The Vessel entered the Sembawang Shipyard on March 2, 1977 and entered drydock on March 3, 1977. On March 10, 1977, the Vessel left drydock and was shifted to Sembawang Berth No. 12 for additional repairs. Repairs were finally completed and the Vessel proceeded to sea on March 31, 1977. (Berner Aff., generally)

Plaintiff's decedent, Leong Chong, was employed as a steel worker by Sembawang. On March 24, 1977, the deceased was sent to the lower engine room of the Vessel to carry out certain repairs. While in this area the deceased was struck on the head by a valve spindle or other piece of metal and sustained a fractured skull and contusion to the brain and died as a result. At the time of the Accident, the deceased was under the direct supervision and control of Sembawang. The valve spindle that struck the deceased allegedly fell through an access hole from the Vessel's machine shop. The eye witnesses to the Accident were: Foo Chek Kow, an apprentice pipe worker employed by Sembawang, who resides at 62-G Andrew's Avenue, Singapore 27 (Notes of Evidence, p. 1); Ong Eng Chuan, a steel worker employed by Sembawang, who resides at No. 16, Tract 7, Mandai Road, Singapore (Notes of Evidence, p. 12); and Prezioso Nicola, a member of the crew of the Vessel, whose permanent address is Corsa Umberto 4/D, 70056 Molfetta, Italy (— Aff., Exhibit —).

Argument and Citation of Authority.

A. The Jones Act is not applicable.

"By the express terms of the Jones Act an employer-employee relationship is essential to recovery." *Spinks v. Chevron Oil Company*, 507 F. 2d 216, 224 (5th Cir. 1975),

• • •

E. *This case should be dismissed under the doctrine of forum non conveniens.*

The doctrine of *forum non conveniens* has long been recognized by American admiralty law.[10] Under the doctrine of *forum non conveniens*, the refusal of a district court to entertain a suit in admiralty is within its sound discretion, "that is, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law. . . . The ultimate inquiry is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice." *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F. 2d 611 (3d Cir. 1966), *cert. denied*, 385 U.S. 945. The burden to establish good cause for dismissal is upon the defendant and unless the balance is strongly in favor of the defendant, the plaintiff's choice should rarely be disturbed. *Menedez Rodriquez v. Pan American Life Insurance Co.*, 311 F. 2d 429,

---

10 *See, The Belgenland*, 114 U.S. 355, 5 S. Ct. 860, 29 L. Ed. 152 (1885); *Canada Melting (sic) Co. v. Paterson Steamships*, 285 U.S. 413, 52 S. Ct. 413, 76 L. Ed. 837 (1982).

432 (5th Cir. 1962), *vacated on other grounds*, 376 U.S. 779, 84 S. Ct. 1130, 12 L. Ed. 2d 82 (1964).[11]

The seminal case in the modern development of the doctrine of *forum non conveniens* is *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). There the court held that the factors to be considered in determining whether a case should be dismissed on the basis of *forum non conveniens* were as follows:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The Court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress"

[11] In admiralty suits between two foreigners dealing with an incident controlled by the *communis juris*, that is, the common law of nations, or where a citizen of the United States is the plaintiff, the rule is that "jurisdiction should be taken unless to do so would work an injustice." *Motor Distributors v. Olaf Pedersen's Rediri A/S*, 239 F. 2d 463, 465 (5th Cir. 1956), *cert. denied*, 353 U.S. 938, *reh. den.* 353 U.S. 989; *Burt v. Isthmus Development Company*, 218 F. 2d 353 (5th Cir. 1955), *cert. denied*, 349 U.S. 922; *Poseidon Scheffahrt G.M.B.N. v. M/S NETUNO*, 474 F. 2d 203 (5th Cir. 1973). While defendant is of the view that this standard does not apply in cases arising out of occurrences which take place in the territorial waters of a particular nation so that the *communis juris* would not apply or which do not involve an American plaintiff, it is clear that this standard is met in this case on many grounds.

> the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 330 U.S. at 508.509.

The *forum non conveniens* criteria of *Gulf Oil Co. v. Gilbert* have been held applicable to actions in admiralty.[12] Notwithstanding the apparent pre-eminence of the *Gulf Oil Company v. Gilbert* decision in the area of *forum non conveniens*, many courts have held that the criteria of *Lauritzen* "serve as an appropriate yardstick for a district court in deciding whether the United States courts

[12] *Paper Operations Consultants International Ltd. v. S.S. HONG KONG AMBER*, 513 F. 2d 667, 671 (9th Cir. 1975); *Poseidon Schiffahrt E.M.B.H. v. M/S NETUNO*, 474 F. 2d 203, 205, n. 5 (5th Cir. 1973); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (1st Cir. 1966); *Mobil Tankers Company v. Mene Grande Oil Company*, *supra*.

should accept or decline jurisdiction of a controversy which is essentially foreign." *Anastasiadis v. S.S. Little John*, 346 F. 2d 281, 283, (5th Cir. 1965), *reh. den.*, 347 F. 2d 823, *cert. denied*, 384 U.S. 920.[13]

Regardless of whether the *Gulf Oil Co. v. Gilbert* criteria, the *Lauritzen* criteria or a combination of the two are applied to the facts of this case, it is clear that a failure to decline jurisdiction will work an injustice. As demonstrated above, an analysis of the applicable *Lauritzen* factors present in this case establishes the absence of a sufficient nexus with the United States to justify the application of American law. This requires the conclusion not only that the law of Singapore is applicable in this case, but also that the courts of the United States do not provide a convenient forum.

A consideration of the traditional *forum non conveniens* criteria articulated in *Gulf Oil v. Gilbert* only serves to reinforce the conclusion based on *Lauritzen* that this Court should decline to exercise its jurisdiction. First of all, the considerations of relative ease to the access of proof, the availability of compulsory process and the cost of obtaining the attendance of willing witnesses strongly supports the declining of jurisdiction. Almost all important sources of proof are located in Singapore: govern-

---

13 Accord: *DeMateos v. Texaco, Inc.*, 562 F. 2d 895 (3d Cir. 1977) (1966); *Yohanes v. Ayers Steamship Co.*, 451 F. 2d 349 (5th Cir. 1971); *Kearney v. Savannah Foods & Industries, Inc.*, 350 F. Supp. 85, 87 (S.D. Ga. 1972); *Vavatsikos v. Soulandris Brothers, Ltd.*, 209 F. Supp. 425 (E.D. La. 1962); *House v. Santa Fe International, Inc.*, 1978 AMC 1899 (S.D. Tex. 1978) (Sterling, J) (relying on *Ramirez v. Zapata Offshore Co.*, S.D. Tex. 1974, C.A. 73-H-1239 decided August 2, 1974, Bue J). [See Appendix II]

mental investigators[14] and other investigators, (who may have acted for Sembawang, among others) and their reports; most fact witnesses to the incident;[15] the supervisory employees of Sembawang who were in charge of the work being performed by deceased; all doctors' and medical reports;[16] experts on Singapore law; pertinent employment and other records of Sembawang; sources of proof as to the age, marital status and earnings of the decedent and his dependants, family support provided by the decedent; probable period of remaining work life; funeral costs; records of workmen compensation payments; and the bona fides of the claimed status of the Plaintiff and those she seeks to represent. The Vessel's officers and crew, many of whom would be required to testify in connection with the defense of this case, are all resident nationals of Italy. (Exxon Rec. Aff.) The cost of obtaining the attendance of willing witnesses for trial in Houston, Texas, would be prohibitive,[17] and many of the witnesses, whether

---

14 Tan Bok Kwee, a Technical Officer attached to the Ministry of Labor, Singapore, who carried out an investigation into the Accident (Notes of Evidence, p. 8); Mun Shi Kin, Police Inspector attached to Pay e Lebar Police Station who also investigated the Accident (Notes of Evidence, p. 10).

15 Foo Chek Yow, Apprentice Pipe Worker employed by Sembawang Shipyard, 62-G Andrew's Avenue, Singapore 27 (Notes of Evidence, p. 1); Ong Eng Chuan, Steelworker employed by Sembawang Shipyard, No. 16, Track 7, Mandai Road, Singapore (Notes of Evidence, p. 12); Tong Nyiap Hin and Subash s/o Faragauan (Notes of Evidence, p. 14).

16 Dr. Wee Keng Poh, Department of Pathology, Toa Payoh Hospital, Singapore, who conducted autopsy on body of Leong Chong (Notes of Evidence).

17 On January 17, 1979, the cost of round trip air fare from Singapore to Houston and return, tourist class, was $1,735.-

(Continued from previous page)

they appear at trial in person or by deposition, would have to be heard through an interpreter.[18]

Secondly, in the present posture of the case, the Defendants are not in a position to assert their indemnity rights in a third party action under Rule 14 of the Federal Rules against the Shipyard, since it is a Singapore business enterprise, and is not subject to the jurisdiction of this Court.[19] It has often been noted that inability to implead other potentiality liable parties in the forum selected by the Plaintiff is a strong factor influencing the determination of whether to decline jurisdiction.[20]

(Continued from previous page)

00. Obviously, the other expenses that would have to be incurred if willing witnesses were brought from Singapore would greatly exceed this amount. On the other hand, to fully develop the case by deposition for trial in Houston would require considerable time and expense.

18 For instance, witnesses Foo Chek Kow and Ong Eng Chuan apparently speak the dialects Hainanese and Hokkien respectively (Notes of Evidence, pp. 1, and 12).

19 Paragraph 15a of the Repair Contract between Sembawang Shipyard, Ltd. and EIC provides:

> The CONTRACTOR [Shipyard] shall indemnify the OWNER against and hold said OWNER harmless from all claims and damages arising from injuries to any person or persons (except employees of the OWNER, unless said employees are injured through carelessness or negligence of the CONTRACTOR) or from damage to property in or about or connected with the repairs, renewals, alternations (sic), conversion, drydocking, equipment and operations of the vessel until completion of this contract as set forth in paragraphs 9 and 10 of this AGREEMENT.

20 *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451-452 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 501, 502 (1st Cir. 1966); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 815 (S.D. N.Y. 1972); *House v. Santa Fe International Corp.*, 1978 AMC 1899, 1905 (S.D. Tex. 1978).

Third, there are many other pretrial problems that would "make the trial of this case easy, expeditious and inexpensive" in Singapore, but would lead to hardship if the case is tried here. For instance, as discussed above, this court would be required to apply the law of Singapore. As previously noted, many courts, particularly those employing *Lauritzen* criteria in the *forum non conveniens* context find this factor pivoted to their determination as to whether to decline jurisdiction.[21] In *De Mateos v. Texaco, Inc.*, 562 F. 2d 895, 899 (3d Cir. 1977), the Third Circuit went so far as to hold that "The propriety of forum non conveniens dismissal would seem to turn, then, on whether the District Court was correct in concluding that American law does not apply."

Finally, there are factors of public interest to be considered. As was said by the Court in *Fitzgerald v. Texaco, Inc., supra*, 521 F. 2d at 450:

> Another factor to be considered is the public interest which includes a limitation on the use of a local forum for resolution of controversies which lack significant local contacts, especially when trial of the action would create administrative problems for the courts.[22]

---

21 *Canada Melting (sic) Co. v. Paterson Steamship*, 285 U.S. 413, 52 S. Ct. 413, 76 L. Ed. 837 (1932); *Gulf Oil Company v. Gilbert, supra.*, 330 U.S. at 509; *Kozial v. The Fylgio*, 230 F. 2d 651 (2d Cir. 1956), *cert. denied*, 352 U.S. 827; *Del Rio v. Ballenger*, 391 F. Supp. 1002, 1004 (D. S.C. 1975); *Noto v. Cia Secula di Armanerto*, 310 F. Supp. 639, 648 (S.D. N.Y. 1970); *In Fitzgerald v. Texaco, Inc., supra.*, 521 F. 2d at 448, it was held that dismissal under doctrine of *forum non conveniens* can be warranted "even though the law applicable in the alternative forum may be less favorable to the plaintiff's choice of recovery."

22 *See, Papers Operator Consultants International, Ltd. v. SS HONG KONG AMBER, supra.*, 513 F. 2d at 672.

Except for the facts that Plaintiff filed her action in this District and that the Defendant Exxon Corporation is amenable to process here, there is no contact between this case and this District. Indeed, except for the fact that the indirect beneficial owner and manager of the Vessel is an American multinational corporation, there is no contact between this case and the United States. This is a matter local to Singapore and the United States has no more interest in its resolution than the Republic of Singapore has in the resolution of a claim of the personal representative of a deceased American shipyard worker killed in the Port of Houston while repairing a vessel registered in Singapore or owned by Singapore citizens. This matter falls into that class of case where "The Court must be concerned with and cannot disregard another aspect of the matter—how it came about that these suits were commenced in a court of the United States 'in a community which has no relation to the litigation.'" *Noto v. Cia Seculer di Armauentu*, 310 F. Supp., 639, 649 (S.D. N.Y. 1970).[23]

In considering the various factors present in this case, it is clear both under *Lauritzen* and *Gulf Oil Co. v. Gilbert*, that the contacts between this case and the United States

---

[23] The court went on to observe:

> The courts would be derelict if they supinely stood by, aware that improper practices had flooded their dockets with litigation that truly belongs in another forum. The courts have "inherent power to protect [themselves] from a deluge of litigation by nonresidents, inspired by contingent retainers to avoid or overcome foreign laws and interpretation and application thereof by foreign courts * * *." (quoting from *Heine v. New York Life Ins. Co.*, 50 F. 2d 382, 387 (9th Cir. 1931).

are not sufficient to justify the retention of jurisdiction and that dismissal on *forum non conveniens* grounds would best serve the conveniens of the parties and the ends of justice.

Factors Supporting Retention of Case:	Factors Supporting Dismissal of Case:
1. Plaintiff's choice of forum.[24]	1. Plaintiff's decedent met his death in Singapore.
2. Vessel is managed by Defendant from the United States.	2. Plaintiff's decedent was a resident of Singapore.
3. Vessel is owned by Liberian corporation that is a 100% owned affiliate of Exxon Corporation.	3. Plaintiff's decedent was employed by a Singaporean business concern to work in Singapore.
	4. The courts of Singapore are available to Plaintiff.
	5. The law of Singapore controls the adjudication of this case.
	6. Most liability witnesses and all damage witnesses are in Singapore and are not amenable to the process of this court.
	7. The cost of obtaining the testimony of willing witnesses would be substantial.
	8. Defendants cannot implead the shipyard or the deceased's employer in the United States.
	9. The United States has no interest in the resolution of this case.
	10. Plaintiff will not be significantly inconvenienced by dismissal.[25]

---

[24] The weight to be given to a plaintiff's choice of forum is dependent on several fatcors. Where the plaintiff is an American citizen, his choice is entitled to greater weight.

(Continued on following page)

While there are very few cases dealing directly with the question of whether American courts should accept jurisdiction of claims of foreign maritime workers injured in a foreign country while working on an American owned vessel, the cases that have faced the question are uniform in holding that dismissal on *forum non conveniens* grounds is appropriate. *Spencer v. Alcoa Steamship Company*, 221 F. Supp. 343 (E.D. N.Y. 1963), *aff'd per curiam*, 324 F. 2d 957 (2d Cir. 1963); (Jamaican longshoremen injured on American vessel); *Lernonis v. Prudential-Grace Lines, Inc.*, 81 Misc. 2d 614 (N.Y. S. Ct. 1975) (Greek longshoreman injured in Greek port); *Cf. Del Rio v. Ballenger*, 391 F. Supp. 1002 (D.S.C. 1975) (Panamanian national injured in auto collision in Panama).

WHEREFORE, Defendants respectfully urge that the Plaintiff's claims for relief under the Jones Act, the Death on the High Seas Act, and the General Maritime Law of the United

* * *

(Continued from previous page)

Swift & Co. v. Compania Colombiana, 339 U.S. 684, 697, 70 S. Ct. 861, 94 L. Ed. 1206, 1215, 19 ALR 2d 630 (1950); *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F. 2d 611, 614 (3d Cir. 1966), *cert. denied*, 385 U.S. 945; *Burt v. Isthmus Development Company*, 218 F. 2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U.S. 922. Implicit in these decisions is the principle that where a foreign plaintiff selects an American forum, his selection can much more readily be disregarded. *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (1966); *De Mateos v. Texaco Inc., supra; House v. Santa Fe International Corporation, supra; Spencer v. Alcoa Steamship*, 221 F. Supp. 343 (E.D. N.Y. 1963) *off'd per curiam*, 324 F. 2d 957 (2d Cir. 1963); *Del Rio v. Ballenger*, 399 F. Supp. 1002 (D.S.C. 1975); *Alverez v. Creole Petroleum Corporation, supra.*

25 *Fitzgerald v. Texaco, Inc., supra*, 521 F. 2d at 452.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . ;	)	
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . ;	)	CIVIL ACTION NO. H-78-477 (Filed June 23, 1980)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	Judge Gabrielle K. McDonald
v.	)	
EXXON CORPORATION, ET AL.	)	

MEMORANDUM AND RECOMMENDATION:

This case involves three death claims from accidents aboard the tanker ESSO WILHELMSHAVEN ("Vessel"). The Vessel is documented in Liberia and is owned by Esso Tankers, Inc., a Liberia corporation which is a 100% indirectly owned affiliate of Exxon Corporation. The Vessel was managed under a marine service agreement by Exxon International Company, an unincorporated division of Exxon Corporation. In March, 1977, the Vessel entered shipyard in Singapore for repair work pursuant to written contract between Exxon International and Sembawang Shipyard Ltd. On March 13, 1977, two shipyard workers were killed in a fire and explosion in an oil tank in the Vessel. On March 24, 1977, a third shipyard worker, while engaged in repair work on the Vessel, was injured

and died after being struck in the head by a piece of falling metal.

Representatives of all three decedents have filed suit to recover under the Jones Act, the Death on the High Seas Act, the Texas Wrongful Death Statute, and the general maritime law of the United States. Representatives of the decedents in the explosion accident are also claiming under the Texas Survival Statutes, the Longshoremen's and Harbor Worker's Compensation Act, and for common law negligence and common law/maritime law products liability.

Claim on the head injury case was filed as H-78-477. Claims on the explosion case were filed as H-78-628. The two cases have been consolidated in H-78-477.

Defendant Exxon Corporation has filed Motion for Partial Summary Judgment and to Dismiss under the doctrine of *forum non conveniens*. Responses, brief and affidavits have been filed by the respective parties.

Explosion Accident

Plaintiff's decedents Teo Ho Aik and Koo Ming Kuang were welders employed by Roma Project Engineering Co. which provided workers to the Sembawang Shipyard for ships under repair at the shipyard, including the Vessel. On March 13, 1977, Aik and Kuang and a third Roma welder, Yip Lai Chee, were detailed by Roma's chargeman for the welding section to perform welding work in Port Tank No. 3. At about 2:35 that afternoon there was fire and an explosion in the tank. Aik and Kuang were killed. Chee was knocked unconscious but recovered. After an inquest, the coroner in Singapore returned an

open verdict as to the deaths of the two decedents. Plaintiff Loo Wee Sang is Kuang's representative. Yip Ong Chu is Aik's representative.

Falling Object Accident

Decedent Leong Chang was a shipwright employed by Sembawang Shipyard. On March 24, 1977, he had been sent to the lower engine room of the Vessel for repair work. In the ship's machine shop above the engine room, Nicolo Prezioso, member of the ship's crew, was working on a valve spindle. The spindle was dislodged, rolled across the deck and fell through an open access hatch above the lower engine room. While no one saw the spindle strike Chang, a worker nearby heard a thud and turned to see Chang lying face down on the deck with the spindle and his helmet near him. Chang later died in the hospital. The autopsy report certified cause of death as contused brain due to a fractured skull. After the inquest, the coroner found that Prezioso was not criminally negligent for Chang's death. Chick Kam Choo is the decedent's representative.

Jones Act

The Jones Act, 46 USCA § 688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in case of death of any seaman as a result of any such personal injury the personal representative . . . may maintain an action. . . ."

The Jones Act does not define the term "seaman." To qualify as a Jones Act seaman, the injured worker must

be able to show that he was assigned permanently to or performed a substantial part of his work on a vessel, and that his duties contributed to the function of the vessel or to the accomplishment of its mission, or to its operation or welfare in terms of its maintenance. *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). It is clear that the decedents fail to meet the first requirement of *Robison*. They were not permanently assigned to the Vessel nor to perform a substantial part of their duties on this Vessel. Decedents were shipyard workers assigned by the yard for repairs or work on any vessel in the yard. Their relationship to this Vessel was only transitory. In *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5th Cir. 1960), the Court held that a welder on a barge, who worked under essentially the same conditions as presented in this case, was not a seaman. *Thibodeaux* is controlling. While the question of deciding who is a seaman may raise a question of fact for a jury, if there is no genuine factual dispute to be resolved, reference to the jury is not necessary. *Owens v. Diamond M Drilling Co.*, 487 F.2d 74 (5th Cir. 1973). Summary judgment may properly be granted when there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman. *Billings v. Chevron, USA, Inc.*, — F.2d — (5th Cir., No. 79-3173, June 9, 1980). Under the *Robison* test and the evidence presented, this magistrate finds no basis to support Plaintiff's contention that their decedents were seamen.

Further, the Jones Act by its terms requires an employer-employee relationship. *Spinks v. Chevron Oil Co.*, 507 F.2d 215 (5th Cir. 1975). Two of the decedents were employees of Roma and one was an employee of Sembawang Shipyard. There is no evidence of any control by

Defendants over these workers to justify a "borrowed employee" status. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).

Claims under the Jones Act are not available to Plaintiffs.

Death on the High Seas Act (DOHSA)

DOHSA, 46 USCA § 761 *et seq.*, by its title and by its terms, applies to deaths occurring on the high seas. The accidents resulting in the deaths of the decedents occurred in the territorial waters of Singapore, not on the high seas.

Claims under DOHSA are not available to Plaintiffs.

Longshoremen's and Harbor Worker's Compensation Act

Coverage provided by this Act is limited to a situation where "disability or death results from an injury occurring upon the navigable waters of the United States." 33 USCA § 903(a). Since the accidents occurred in Singapore waters, claims under this Act are not available to Plaintiffs.

General Maritime Law, Texas Statutes, Other Claims and Forum Non Conveniens

Since the issue in these subjects involves determining the applicable law, they may be considered together. *Lauritzen*[1] and *Rhoditis*[2] set forth eight factors generally considered in determining the choice of law in a maritime

---

1 *Lauritzen v. Larson*, 345 US 571, 73 S.Ct. 921, 3 L.Ed.2 368; reh. denied 359 US 962, 79 S.Ct. 795, 3 L.Ed.2d 769 (1959).

2 *Hellenic Lines Ltd. v. Rhoditis*, 398 US 306, 90 S.Ct. 1731, 26 L.Ed.2d 252; reh. denied 400 US 856, 91 S.Ct. 23 (1970).

context. *Gulf Oil Company v. Gilbert*[3] is the leading case on the doctrine of *forum non conveniens*. The criteria have not been limited to the particular subject but have been considered in both types of cases.

Lauritzen-Rhoditis analysis must first be made to determine whether application of United States general maritime law is warranted in this case. Defendants have briefed the issue in detail under each of the eight factors, and Plaintiffs have filed brief in opposition. Review of all the cases cited need not be made here. Of the eight factors, only two point toward American law, the allegiance of the defendant shipowner and the base of operations. The Vessel is owned by an affiliate of Exxon, and the headquarters of Exxon is in Houston. The other contacts in this controversy substantially involve Singapore. It is the conclusion of this magistrate that the contacts do not warrant the application of general maritime law of the United States to otherwise foreign transactions.

With the conclusion that statutory and maritime law of the United States should not be applied, determination should then be made whether dismissal is warranted under the doctrine of *forum non conveniens*. This issue has also been briefed by both parties. On one hand, Plaintiffs' choice of forum has been in this Court and Defendant Exxon Corporation's principal place of business is here. On the other, the accidents occurred in Singapore; Plaintiffs are residents in Singapore, as were their decedents; the decedents were employed in Singapore by Singapore businesses to work there; most witnesses are in Singapore;

---

[3] 330 US 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

and there are legal remedies available through the courts in Singapore. Defendants further contend that retention of jurisdiction here would cause an injustice in that Defendants could not seek contractual indemnification from the shipyard. It is this magistrate's conclusion that dismissal is appropriate.

Accordingly, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is RECOMMENDED that Defendants' Motion to Dismiss under the doctrine of *forum non conveniens* be GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 USC § 636(b)(1)(C).

Done at Houston, Texas, this 18th day of June, 1980.

/s/ H. L. Platter
H. LINGO PLATTER
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . :	)	CIVIL ACTION NO. H-78-477
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . :	)	CIVIL ACTION NO. H-78-628
	)	(CONSOLIDATED)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	(Filed July 31, 1980)
v.	)	Judge Gabrielle K. McDonald
EXXON CORPORATION, ET AL.	)	

ORDER OF DISMISSAL

The Court has reviewed the United States Magistrate's Memorandum and Recommendation, Objection of Plaintiffs, and Defendants' Response to Objections. It is ORDERED that said Memorandum and Recommendation be and the same is hereby accepted and adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is further ORDERED, ADJUDGED and DECREED that Defendants' Motion to Dismiss under the

doctrine of *forum non conveniens* is GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

/s/ Gabrielle K. McDonald
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . ;	)	CIVIL ACTION NO. H-78-477
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . ;	)	CIVIL ACTION NO. H-78-628
	)	(CONSOLIDATED)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	(Filed July 31, 1980)
v.	)	Judge Gabrielle K. McDonald
EXXON CORPORATION, ET AL.	)	

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED, without prejudice.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

/s/ Gabrielle K. McDonald
UNITED STATES
DISTRICT JUDGE

NO. 84-00125

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CRAIG, DECEASED and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
vs.	)	270 JUDICIAL DISTRICT
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFF'S ORIGINAL PETITION

(Jury Trial Requested)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY FONG and LEONG CHOY TAN, hereinafter referred to as Plaintiffs, complaining of EXXON CORPORATION; ESSO TANKERS, INC.; and EXXON INTERNATIONAL COMPANY, INC., hereinafter referred to as Defendants, and for cause of action would respectfully show the Court, as follows, to-wit:

I.

Plaintiffs are citizens of Singapore.

Plaintiff, CHICK KAM CHOO is an individual and is the natural Mother of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, minor Plaintiffs. The minor Plaintiffs are the natural children of LEONG CHONG, DECEASED.

Defendant, EXXON CORPORATION, is a corporation authorized to do business in the State of Texas with an agent for service in the State of Texas, and may be served with process by serving its registered agent, Mr. Roy L. Trusty, 800 Bell Street, Houston, Texas 77002.

Defendant, ESSO TANKERS, INC., is a foreign corporation which is doing business in the State of Texas within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within the State of Texas. Said Defendant operates solely as the alter ego of EXXON CORPORATION, and may be served with process by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

Defendant, EXXON INTERNATIONAL COMPANY, INC., is a foreign corporation which is doing business in the State of Texas within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within the State of Texas. Said Defendant operates solely as the alter ego of EXXON CORPORATION, and may be served by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

II.

This suit is brought under Article 4678, Revised Civil Statutes of Texas, which provides as follows:

> "Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or Country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case."

III.

In connection with the foregoing, your Plaintiff would show that the nation of which the Plaintiff is a citizen has "equal treaty rights" with the United States. In connection with the foregoing statute, your Plaintiff would show that the Court should apply American (either the Jones Act and/or Texas common law) to this case. Plaintiff would show that there are substantial and/or significant contacts, within the meaning of the Texas conflict of law rules, between the Defendants and the transaction in question and the United States and Texas. Therefore, the application of American and Texas law is mandated. In this connection, Plaintiff alleges recovery under the Wrongful Death Statutes of Texas, Article 4671-4678 R.C.S., and the Survival Statute of the State of Texas, Article 5525 R.C.S.

IV.

In the alternative, and only in the alternative, Plaintiff requests the Court to apply the substantive law of Singapore which the Plaintiff would show is similar to the law of Texas with respect to liability and damages in this case. Notice is hereby given that the law of Singapore may be relied upon as a means of recovery herein.

V.

In addition to all the foregoing remedies, your Plaintiff sues under the Jones Act, 46 U.S.C. § 688. These claims are brought under the provisions of the Jones Act which allows the Plaintiff to sue in State or Federal Court and also under the Pendent Jurisdiction of this Court.

VI.

As pendant to the cause of action asserted herein and in the alternative and independently, suit is brought under 46 U.S.C. § 764 which provides as follows:

> "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding."

In connection with that statute Plaintiff would show that Plaintiff has a cause of action not only under the laws of the United States but also under the laws of all foreign countries which are connected with the incident in question and now asserts those causes of action herein.

VII.

In addition, Plaintiff hereby expressly pleads all treaties between the United States and the nation of which the Plaintiff is a citizen. Under the terms of those treaties, the Plaintiff is guaranteed equal access to the Courts of the United States as are American citizens granted access to their Courts. It would be a violation of those treaties for this Court to dismiss this case on any grounds or to deny the access to our Courts by these citizens pursuant to the terms and provisions of such treaties. In particular, the Plaintiff now pleads the multilateral treaty entitled "Shipowners Liability" (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693. In particular your Plaintiff pleads Article 11 thereof which provides as follows:

> "This convention in national laws are regulations relating to benefits under this convention shall be so interpreted and *enforced* as to insure a quality of treatment to *all seamen* irrespective of *nationality*, domicile or race."

VIII.

In connection with these claims, Plaintiff would show that on or about the 24th day of March, 1977, the Decedent, LEONG CHONG, was a member of the crew of the vessel "ESSO WILHELM-SLAVEN", when by reason of the negligence of the Defendants, jointly and severally, and/or the unseaworthiness of the vessel and its appurtenances, he suffered and sustained fatal injuries, all of which caused the damages hereinafter alleged. Plaintiff would show that the negligence of the Defendants was a proximate cause of and/or was a cause, in whole or in part, at least to the slightest extent, of the death of the Decedent and the ensuing damages of the Decedent. More-

over, your Plaintiff would show that the unseaworthiness of the vessel and its appurtenances was a proximate cause and/or a cause, in whole or in part, at least to the slightest extent, of the death of the Decedent and the ensuing damages. Moreover, the Defendants are guilty of liability and causation under the law of Texas and/or the Jones Act and thus responsible for Plaintiff's damages under the law of Texas and/or the Jones Act.

IX.

Plaintiff would show that by reason of the death of Decedent, the surviving wife and children have suffered and sustained a loss of economic support that they otherwise would have been entitled to receive; they have sustained a loss of care, counsel, attention, corsortium, society, mental and moral training, and all of the other intangible and tangible rights to damages to which this Plaintiff is entitled under the laws of the State of Texas and/or under the maritime law of the United States and/or the laws of Nigeria.

In addition, your Plaintiff is entitled to recover the reasonable costs of burial of Decedent. Moreover, Plaintiff's estate, that is, the estate of the Decedent, does hereby sue for survival damages to which the Plaintiff's estate is entitled, which are the damages for the pain and suffering sustained by the Decedent to the point of his death. By reason of all of the foregoing, your Plaintiff would show that Plaintiff has been damaged in the sum and amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, for which amount she comes now and sues. Plaintiff would show that the foregoing is merely an estimate of damages and would show the Court that the dam-

ages far exceed the minimum jurisdictional requirements of the Court and Plaintiff actually sues for whatever damages the Court and/or Jury might award her, but in no event less than the amount hereinabove alleged.

X.

Plaintiff would show that the conduct of the Defendants in this case was tantamount to a conscious and willful disregard for the rights of the Plaintiff and others similarly situated and therefore Plaintiff is entitled to punitive damages in the amount that should be assessed by the Jury, as punishment to these Defendants, and as an example to others who might be tempted to engage in the same kind of conscious and willful misconduct, of no less than two times the actual damages awarded.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendants be cited to appear and answer herein, and upon trial hereof that Plaintiff have her actual damages in the sum and amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, punitive damages in the sum and amount of no less than two times actual damages, and such other and further relief to which she may show herself justly entitled.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: /s/ Benton Musslewhite
Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

CO-COUNSEL:

/s/ Fred H. Benners
by Permission
FRED H. BENNERS
3104 Fairmount
Dallas, Texas 75201

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	C.A. NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	(Filed Jan. 26, 1984)

PETITION FOR REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Exxon Corporation and Esso Tankers, Inc., foreign corporations, Defendant in the above entitled and numbered cause, and present this petition for removal of a suit brought by Chick Kam Choo, from the District Court of Harris County, 270th Judicial District of Texas, where the suit was instituted, to this United States District Court for the Southern District of Texas, Houston Division, and expressly reserving all questions other than that of a removal, for facts entitling your petitioner to removal respectfully shows:

1.

On January 3, 1984 in the District Court of Harris County, 270th Judicial District of Texas, Cause No. 84-

00125 upon the docket of said Court, Chick Kam Choo, as Plaintiff, filed suit and commenced her action against Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., Defendants, your petitioners herein; service of said citation was made on the petitioner Exxon Corporation on January 13, 1984 in the City of Houston, Harris County, Texas; that thirty days have not expired after the date of service of process upon that Defendant.

2.

The above entitled and numbered cause is a suit of a civil nature at law; that it appearing from the petition that Plaintiff seeks to recover from your petitioner the sum of $1,000,000.00 actual and an unstated amount of punitive damages for personal injuries to Plaintiff allegedly caused by Defendant's negligence and/or unseaworthiness of the M/T ESSO WILHELMSHAVEN together with costs of court, all as more fully appears from the allegations of Plaintiff's petition herein.

3.

That the Plaintiff at the time of the commencement of the said suit and at all of the times mentioned in the petition was, and now is, a citizen and resident of the Republic of Singapore, a country other than the country of incorporation or principal place of business of Defendant.

4.

The Defendant, Exxon Corporation, was at the time of the commencement of said suit, and was at all times mentioned in the petition herein, and still is, a corporation

organized and existing under the laws of the State of New Jersey, and has its principal place of business in the State of New York in the United States of America, which state is different from that country of which Plaintiff herein is a citizen and resident as aforesaid. The Defendant Exxon International Company, was at all times mentioned in the petition herein, and still is a (sic) unincorporated division of the Defendant Exxon Corporation. The Defendant Esso Tankers, Inc. was at the time of the commencement of said suit, and was at all times mentioned in the petition herein and still is, a corporation organized and existing under the laws of the Republic of Liberia where it maintains its principal place of business.

5.

The aforesaid controversy between Plaintiff, a citizen and resident of the Republic of Singapore, and Defendants, citizens and residents of the State of New Jersey and the Republic of Liberia, and having their principal places of business in the State of New York and Liberia is within the diversity jurisdiction of the United States District Court for the Southern District of Texas, Houston Division; that the matter in controversy between the Plaintiff and said Defendant exceeds, exclusive of interest and costs, the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS; that your petitioner denies any liability herein on its part and disputes such claims of the Plaintiff, and states that it has valid defenses.

6.

The petitioners present herewith a copy of all process, pleadings, and orders served in such action, to-wit: Copies

of the Plaintiff's petition and citation thereon, attached hereto as Exhibit "A".

7.

This suit is removable notwithstanding the allegations contained in Plaintiff's Petition that her decedent was a seaman and that she is entitled to recover under the Jones Act because it has been finally decided in an identical action filed in this Court by the same Plaintiff being closed Civil Action No. H-78-477, styled *Chick Kam Choo, et al. v. Exxon Corporation, et al.*, that the Plaintiff's decedent was not a Jones Act seaman as a matter of law. *See Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (4th Cir. 1983) cert. den. 104 S.Ct. 98.

8.

That petitioner has made, executed, presents and files herewith a good and sufficient bond in the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, with sufficient surety for paying all costs and disbursements incurred if said District Court should hold that said suit was not removable or was improperly removed to this Court.

WHEREFORE, the Defendants, Exxon Corporation and Esso Tankers, Inc., pray that this Honorable Court enter such further orders and grant such further relief as may be necessary to secure removal herein and prevent further proceedings in said District Court of Harris County, Texas, and for such other relief as Defendant is justly entitled to receive.

Respectfully submitted,

By /s/ James Patrick Cooney
James Patrick Cooney
Attorney in Charge
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380
Attorneys for Defendants,
Exxon Corporation and Esso
Tankers, Inc.

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this date personally appeared James Patrick Cooney, who being duly sworn on oath says:

I am with the firm of Royston, Rayzor, Vickery & Williams. I have read the foregoing Petition for Removal and know the contents thereof, and the same are true and correct; that the sources of my information are correspondence from Defendant as well as records with which I have been supplied.

/s/ James Patrick Cooney
James Patrick Cooney

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 26th day of January, 1984.

/s/ Rosalie L. Smith
Notary Public in and for
Harris County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually	)	
and As Administratix and/or	)	
Representative of the Etsate of	)	
LEONG CHONG, Deceased, and	)	
as Next Friend of LEONG CHOY	)	
WAN, LEONG CHOY HUR,	)	C. A. NO.
LEONG CHOY FONG and	)	H-84-497
LEONG CHOY TAN	)	
	)	
vs.	)	
	)	
EXXON CORPORATION,	)	
ESSO TANKERS, INC. AND	)	
EXXON INTERNATIONAL	)	
COMPANY, INC.	)	

MOTION OF PLAINTIFFS TO REMAND CAUSE TO STATE COURT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause, and files this their Motion to Remand to the State court, requesting that this Court remand this cause to the District Court for Harris County, Texas and order all costs of this Court be paid by the Defendants, as well as attorneys fees of the Plaintiff, and further requesting this Court to impose sanctions, and for such motion would respectfully show the Court as follows, to-wit:

I.

Rules Governing Removal Generally

Removal of a case from the State Court in which it was originally brought to Federal Court is governed by the provisions of 28 U.S.C. §§ 1441 *et seq.* Generally, a

case is removable only if it could have originally been brought in a federal court. 28 U.S.C. § 1441(a). Cases in which diversity jurisdiction exists are generally removable if none of the defendants is a resident of the state in which the action was originally brought. 28 U.S.C. § 1441 (b). When a Congressional statute, such as the Jones Act, 46 U.S.C. § 688, provides that a claim or cause of action cannot be removed, it must remain in State Court unless it is brought in conjunction with a separate and independent claim or cause of action that would be removable if sued upon alone. 28 U.S.C. § 1441(a), (c). Finally, the courts have held that removal jurisdiction is a derivative jurisdiction. If subject matter jurisdiction does not exist at the Sate Court level, the action may not be removed even though it could have originally been brought in the federal courts. See *Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

Once a case has been removed to Federal Court and a motion to remand has been made, defendants always bear the burden of establishing that removal is proper. 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721 at p. 530. Removability is determined by the plaintiffs' pleadings and an action cannot be removed because plaintiff failed to assert a claim that would have been removable. *Id.* The removal statutes are strictly construed against removal and many courts have held that all doubts should be resolved against removal of an action. *Id.* at 535-37.

II.

Jones Act Allegations Require Remand

This cause should be remanded because the Plaintiffs have alleged a cause of action under the Jones Act, 46

U.S.C. § 688. It is the unquestionable law of the Fifth Circuit that in such situations, the Court must remand the case to State Court—that is, where the Plaintiffs have chosen to file a Jones Act case in the State court, as the Plaintiffs have in this case (see Plaintiffs' Original Petition filed in the State Court suit, in the 270th Judicial District Court of Harris County, Texas, Cause No. 84-00125, to which Petition reference is made for all purpose, the same being incorporated herein by reference and being the same petition that was attached to the Defendants motion for removal to this Court). As can be seen from said petition, your Plaintiffs have clearly alleged a cause of action under the Jones Act in the State Court. Under such circumstances, this Court has no choice but to remand to State court. As mentioned above, subsection 1441(a) of Title 28 of the United States Code, which announces the general rule for removability, contains the important caveat "[e]xcept as otherwise provided by Act of Congress, . . . " cases in which the United States courts have original jurisdiction shall be removable. The instant case involves a claim pursuant to the Jones Act, 46 U.S.C. § 688. That act reads in part:

> . . . . and in the case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . . ."

This provision makes the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. § 51 et seq., applicable to death actions by seamen. Section 6 of F.E.L.A., 45 U.S.C. § 56, allows an action to be brought in either state court or federal court by a seaman or a seaman's representative. Apparently deciding that such an election would have little value if the action was removable to federal court at a defendant's option, Congress originally provided in Section 56 that F.E.L.A. actions brought in state court would not be removable. Later this provision was deleted from the F.E.L.A. itself, and was incorporated into the sections of Title 28 that deal with the removability of actions. Section 1445(a) of Title 28 today provides that:

> A civil action in any state court against a railroad or its receivers or trustees, arising under Sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

The Fifth Circuit, whose case law this court is bound to follow, has held pursuant to this subsection that a Jones Act claim brought in state court may not be removed to federal court. *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500 (1952). *Pate* was cited with approval by the Supreme Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 480 fn.29 (1959).

This non-removability of a Jones Act claim should not end the Court's inquiry, however, since 28 U.S.C. § 1441(c) provides that:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Defendants argue that since Plaintiffs have asserted a cause of action for unseaworthiness under the General

Maritime Law in addition to the Jones Act cause of action, a separate claim or cause of action which would be removable if sued upon alone exists, and, under § 1441(c), the entire case is removable. Such an argument would overlook the second part of the Fifth Circuit's holding in *Pate v. Standard Dredging Corp., supra*, 193 F.2d at 500-02, namely, that a claim for unseaworthiness is not a separate and independent cause of action under § 1441(c) because both it and the Jones Act claim arise from "a single wrongful invasion of a single right" of a plaintiff. *Pate, supra*, 193 F.2d at 501; see also *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 602 (1927); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540 (1951). Even if such a claim were construed to fall under the Death on the High Seas Act (DOSHA), the same reasoning, that it involves a single invasion of a single right of the plaintiff, would apply. See the opinion by Judge Kennerly in *Ducoff v. Cities Service Oil Co.*, 102 F.Supp. 423 (S.D. Tex. 1951) which presents exactly the same fact situation as the instant case—a death action under both the Jones Act and unseaworthiness. The allegations contained in the state court petition regarding the Jones Act and the General Maritime Law do not, under the law of this circuit or of this district, constitute separate and independent claims. The action is therefore not removable on the basis of § 1441(c).

III.

Previous Determination By This Court That Jones Act Does Not Apply Was Not A Binding Determination And Does Not, In Any Event, Obviate Court's Duty To Remand Case To State Court

Despite the consistency of the Fifth Circuit cases requiring that this case be remanded to state court, where

Jones Act allegations have been made in state court, the Defendants attempt to circumvent such decisions by asserting that this Court has previously determined in this case that the Jones Act does not apply. See allegations contained in Paragraph VII of Defendants "Petition for Removal". However, the Defendants failed to mention that the dismissal order to which the Defendants refer (in Cause No. H-78-477 in the United States District Court for the Southern District of Texas), which dismissal order is attached to the Defendants Motion to Dismiss and for Sanctions, filed in this cause, was a dismissal "*without prejudice*". (See Final Judgment dated July 31, 1980 in said cause, H-78-477). It is hornbook law, something each law student learns on the first day of law school, that a dismissal "without prejudice" does not constitute "res judicata" as asserted by the Defendants in their Petition for Removal. It is obvious that the allegations in the Defendants' Petition for Removal and in the Defendants "Motion to Dismiss and for Imposition of Sanctions" (see Paragraph I of the Motion to Dismiss and for the Imposition of Sanctions) to the effect that the prior dismissal order of this court, which was clearly "without prejudice" constituted res judicata, is a totally frivolous allegation, for which the imposition of sanctions should indeed be made against the counsel for Defendants. In any event, the prior order of this Court does not preclude the action in State court, since the order of dismissal in this Court was "without prejudice".

IV.

Prior Determination That Choice of Law Should Be Foreign And The Case Should Be Dismissed On Grounds of Forum non Conveniens Does Not Obviate Requirement That Case Be Remanded

Defendants assert that because this Court dismissed this case on grounds of forum non conveniens, in the previous case, the Plaintiffs cannot state a cause of action on the basis of the Jones Act in State Court. In the first place, the position of the Defendants fails to take account of Rule 41(e) of the Federal Rules of Civil Procedure which clearly provides dismissals concerning venue are not final orders that can constitute res judicata. Moreover, the Fifth Circuit, whose rulings this Court is bound to follow, has held in the case of *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979) that allegations of failure to state a cause of action will not overcome the ban on removal of Jones Act cases found in 28 U.S.C. § 1445(a).

The Jones Act incorporates all statutes dealing with personal injury and death rights and remedies of railroad workers, including the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (FELA), *and 28 U.S.C. § 1445(a), which prohibits removal of FELA cases.* In the *Yawn* case, the Fifth Circuit was faced with the question of whether this ban on removal of FELA cases continued to apply when a defendant has removed a case alleging failure to state an FELA cause of action. Deciding that the ban on removal provided in § 1445(a) continued to apply when such allegations are made, the Court said:

> "Congress has unequivocally declared that in FELA suits filed in state courts, the federal courts are without jurisdiction to proceed in the matter until the cause has run its course at the state level. *Gamble v. Central of Ga.Rv.*, (sic) 486 F.2d 781 (5th Cir. 1973). *The initial question is whether the prohibition against removal found in section 1445(a) applies when the defendant asserts that the complaint fails to state a cause of action under the FELA. We think it does.* See *Smith v. Camas Prairie Ry.*, 216 F.799 (D.C. Idaho 1914), cited by this court in *Porter v. St. Louis-San Francisco Rv.*, 354 F.2d 840, 844 (5th Cir. 1966). Consequently, a defendant who asserts that the state court erred in assessing the sufficiency of the FELA *complaint cannot, for that purpose, remove the suit but most (sic) pursue his arguments in state court channels before appealing to the federal courts for relief.*" (519 F.2d at 316; emphasis added).

V.

If Allegations In Plaintiffs' State Court Petition Present Any "Possibility" Of A Valid State Court Action, Cause Cannot Be Removed On Grounds Of Fraudulent Joinder Of State Court Actions

In order to properly plead a cause of action under the Jones Act, a plaintiff must allege that he was a seaman employed by the Defendant and that he was injured through the Defendant's negligence while in the course and scope of his employment. These facts were properly alleged by Plaintiffs, and the Defendants have shown absolutely nothing to indicate that such allegations were in any way "fraudulent". Defendants rely, basically, upon their contention that Plaintiffs have failed to state a claim under the Jones Act. According to the Fifth Circuit, this is not enough to overcome the ban on removal found in 28 U.S.C. § 1445(a) and made applicable to Jones Act cases by the decision in *Pate v. Standard Dredging Corp, supra.*

In addition to the *Yawn* decision, which clearly mandates that any challenge Defendants have to the Jones Act cause of action should be made in State rather than federal court, Plaintiffs would again like to stress that the determination of fraudulent joinder of a Jones Act claim does not involve an intensive inquiry into whether Plaintiffs will prevail in State court. Instead, the test is whether there is *any possibility* that Plaintiffs have asserted a valid cause of action in State court. In other words, Defendants must show that there is absolutely *no possibility* that Plaintiffs have asserted a valid cause of action in State court. As can be seen from the discussion below, clearly a valid cause of action has been stated in State court. Since any uncertainties as to the current state of controlling substantive law must be resolved in favor of Plaintiffs, *B, Inc. v. Miller Brewing Co.*, 663 F.2d 245 (5th Cir. 1981), it is obvious that there is at least the "possibility" that Plaintiffs could recover under the Jones Act in State court and that therefore this case should not have been removed. See *Dudley v. Community Public Service Co.*, 108 F.2d 119 (5th Cir. 1939).

VI.

Forum Non Conveniens Determinations In Federal Courts Not Binding On State Courts

Moreover, if the Defendants attempt to give any effect of finality to the dismissal without prejudice concerning the forum non conveniens determination, we should point out that the United States Supreme Court held, in *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 84 S.Ct. 185 (1963), that a prior final decision to dismiss for forum non conveniens in state court has no res judicata effect upon a motion to transfer pursuant to 28 U.S.C. § 1401(a)

filed in a later identical federal suit. 28 U.S.C. § 1404(a) is, of course, a codification of the common law doctrine of forum non conveniens. In reaching this decision the Court noted that dismissal on the basis of forum non conveniens is discretionary and that different factors apply in different forums. This reasoning is particularly apropos to this case since Texas Revised Civil Statutes (Vernon's), Article 4678 provides:

> *Death in a foreign State.* Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case.

Due to this statute, there is considerable doubt as to whether the doctrine of forum non conveniens can be applied to a personal injury or death case brought in the Texas courts. See *Allen v. Bass*, 47 S.W.2d 426 (Tex.Ct.Civ.App., El Paso, 1932, writ ref'd). In that case, the court was construing Article 4678 and held unequivocally that in a suit brought under Article 4678 the courts have no discretion to dismiss a cause of action asserted on grounds of *forum non conveniens*. The court had this to say about Article 4678:

" . . . under article 4678 we think he (the Plaintiff) *has an absolute right to maintain the present action* in the courts of this State if New Mexico is to be regarded as a foreign state, within the meaning of Article 4678, and *the courts of this state are left without any discretion in the matter.*"

Corpus Juris, vol. 26, p. 889, says:

"Foreign State, a Foreign Country or Nation: For all legal purposes the term embraces a neighboring state." And in the notes refers to a number of cases, among them, Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25. We refer to the case for the argument, without quoting.

We have concluded that article 4678 opens the courts of this state to citizens of a neighboring state (and foreign country) and *gives to them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state*, (46 S.W.2d at p. 427; emphasis ours).

Allen v. Bass has not been reversed, nor distinguished, nor discredited by any subsequent decision. It is the law of Texas at the present time. For discussion of this, see Comments, *Forum Non Conveniens: The Need For Legislation In Texas*, 54 Tex.L.Rev. 737 (1976); and *Article 4678 and Forum Non Conveniens*, O'Quinn and Hagans, Vol. 18, #1, Trial Lawyers Forum, pp. 11-14.

There are a number of cases wherein the choice-of-law/forum non conveniens question has been determined adversely to the Plaintiffs in federal court, the suit has been subsequently filed in State court, and the State courts have held that the prior finding of the federal courts with respect to choice-of-law/forum non conveniens is not finding (sic) upon the State court. See *Boskoff v. Boeing Co.*, 16 Av.L.Rep. (CCH) 17,753 (Sup.Ct. N.Y. 1981); *Kahn v.*

United Technologies Corp., 16 Av.L.Rep. (CCH) 17,751 (Sup.Ct. Conn. 1981); and *Aboujdid v. Gulf Aviation Co., Ltd.*, 108 Misc.2d 175 (Sup.Ct. 1980) aff'd, 448 N.Y.Sup.2d 427 (First Dept., 1982).

Moreover, the Federal Courts in the Southern District of Texas have held that, with respect to the choice-of-law and forum non conveniens question, the Federal Court should look to the State laws with respect thereto. *Tokio Marine & Fire Insurance Company, Ltd. v. Bell Helicopter Textron, A Division of Textron, Inc.*, 17 Av.Cas. 17,321 (S.D. Tex., 1982). The Court in that case stated that where a federal court is adjudicating a state substantive action (for example if we assume arguendo for the moment that the Jones Act does not apply, as contended by the Defendants, thus presenting the question of adjudicating the State Court claims under a diversity theory), the federal court "must follow the substantive law of the state in which the Federal Court is sitting (citations omitted), including the forum's choice of law rules (citations omitted)". The Court went on, in that case, to state that "this Court (the Federal Court) is therefore required to look at Texas choice of law rules".

VII.

Diversity Not Present Here

***Alternatively, even** if the Jones Act did not apply, this cause cannot be removed on the grounds of diversity of citizenship as contended by the Defendants (see Paras. III-V of the Defendants' Petition for Removal).*

As hereinafter argued, it is clear without any doubt that this cause should be remanded, despite allegations of diversity of citizenship as a basis for removal.

As provided by 28 U.S.C. § 1441(b), a case can be removed on the basis of diversity only if "none of the Defendants is a resident of the state in which the action was originally brought". If any one of the Defendants is a resident of the state in which the suit is brought, the case is not removable. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch), 267, 2 L.Ed. 435 (1806). In this case, there is a fact question as to whether Exxon Corporation is a "citizen" of the State of Texas. It has a principal office here. The question is whether or not the office in Houston, Texas is its principal office or the office in New York is its principal office. The law is clear that two places are relevant as far as "citizenship" in diversity cases is concerned: the place of incorporation and the place where the home office or principal place of business is maintained. In this connection your Plaintiffs have noticed the deposition of the corporate officer of Exxon Corporation to inquire about those facts. If the facts demonstrate that Exxon's principal place of business is Houston, Texas, then of course this case is not removable and for that additional reason, the cause should be remanded.

VIII.

It has long been held by the Courts that suits by aliens against aliens are not removable because such action is not one where the Federal District Court had original jurisdiction. *Merchants Cotton-Paris & Stewarts Company v. Insurance Company North America*, 151 U.S. 368 (Sup.Ct., 1894); *Kavourgias v. Nicholaou*, 148 F.2d 96 (9th Cir. 1945); *Compania Minerae y Comparadora v. American Metal Company*, 262 F. 183 (5th Cir. 1920); and *Johnson*

v. Action Insurance Company, 35 F. 374 (Ct.App.-Mich. 1888). The foregoing rule still applies even though Defendants who are citizens of states of the United States other than the forum state are added to alien Defendants. *Compania Minerae y Comparadora v. American Metal Company*, supra. In the foregoing case alien Plaintiffs brought suit against alien Defendants *and* Defendants who were citizens of a state and the court expressly held that such case was one in which the federal district court did not have original jurisdiction over the suit brought by the alien Plaintiffs and that therefore the cause could not be removed from a state court to the federal court. We submit that the foregoing case is totally controlling of this case and mandates that this Court remand this cause of action to State Court.

In this case, the Defendants' Petition for Removal is fatal unto itself. In it Defendants stipulate and admit that the Plaintiffs are citizens of "the Republic of Singapore", a foreign country, and that the Defendant Esso Tankers, Inc., is a corporation incorporated under the laws of "the Republic of Liberia" where, as the Defendants alleges, admits and stipulates "it maintains its principal place of business in" (see page 3 of the Petition for Removal). Therefore, since we have, as admitted in the face of the Defendants Petition for Removal, "foreign Plaintiffs" suing at least one "foreign Defendant" the Federal District Court did not have original jurisdiction over the suit; therefore, the cause cannot be removed from a State Court to the federal court and must be remanded. *Compania Minerae y Comparadora v. American Metal Company*, supra.

IX.

Attorneys and Sanctions
Against Defendants Justified

Since the allegations of the Defendants concerning "res judicata" are obviously frivolous and since the removal, in view of the Jones Act allegations in State Court, are obviously frivolous, and since they are further frivolous in view of the admission by the Defendants in the face of their Petition for Removal that this suit involves a suit between foreign Plaintiffs and a foreign corporate Defendant, thus further indicating that the removal action was frivolous, this is an appropriate case for the imposition of sanctions and attorney's fees and costs of Court. See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). In a remand case, the imposition of costs against the removing Defendants includes attorneys fees. *Bass v. Elliot*, 71 FRD 693 (1976). Therefore, the Plaintiffs request the Court to remand this case to State Court, as it should; and impose costs against the Defendants, including attorney's fees in an amount of no less than TWO THOUSAND FIVE HUNDRED AND NO/100 ($2,500.00) DOLLARS; and impose sanctions upon the Defendants in order to deter such future frivolous removals, which only impair the efficiency of the Federal Courts.

Respectfully submitted,

LAW OFFICES OF BENTON
MUSSLEWHITE, INC.

/s/ By: Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was forwarded, via Certified Mail, Return Receipt Requested, to Mr. James Patrick Cooney of Royston, Reyzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002, on this the 27th day of February, 1984.

/s/ Benton Musslewhite
Benton Musslewhite

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	CIVIL ACTION NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

RESPONSE OF EXXON CORPORATION
TO PLAINTIFF'S MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Defendants herein, and file this their Response to Plaintiff's Motion to Remand and would show to the Court as follows:

I.

PLAINTIFF IS PRECLUDED FROM ASSERTING
A JONES ACT CLAIM

The principal thrust of Plaintiff's Motion to Remand is her attorney's contention that the presence of allegations setting forth a claim under the Jones Act in the State Court Petition precludes the removal of this case

from State Court, even though the Jones Act claim asserted in the State Court action is identical to the claim asserted in Civil Action No. H-78-477 filed in this Court on March 14, 1978, upon which summary judgment was entered for the Defendants. According to the Plaintiff's attorney, the granting of summary judgment for the Defendants on the Jones Act issue in the prior action cannot effectively preclude its reassertion in a subsequent case in a different forum because this Court's Final Judgment dismissing the remaining issues in the prior action only dismissed the remainder of the case "without prejudice." In fact, such Final Judgment has no impact on the issues currently before the Court because Plaintiff's claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act, and the general maritime law of the United States had been dismissed in the Court's Order granting Summary Judgment on those issues to the Defendants. Copies of the Plaintiff's Complaint in the first action before this Court, the Order of Dismissal disposing of the Jones Act claim, and the Final Judgment dismissing any remaining issues without prejudice are attached hereto as Exhibit "A".

In particular, though the Final Judgment entered in the prior action dismissed the case without prejudice, the Order of Dismissal upon which the final judgment was predicated provided:

> It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act and the general maritime law of the United States.

The question is thus raised as to whether rulings made pursuant to Rule 56 of the Federal Rules of Civil Procedure which dispose of a portion of the claims asserted in an action pending before the Court as a component of the overall disposition of the action are to have a preclusive effect in subsequent litigation. It seems to be the Plaintiff's position that Judge McDonald in granting Defendants' Motion for Summary Judgment on the Jones Act issue in the prior action was merely playing at a game with no lasting consequence and that the Plaintiff (or her attorney), dissatisfied with the result thus obtained and after futile attempts at reversal at all appellate levels, is now free and unencumbered to start anew as if the previous action had never been decided. Surely this cannot be the law. As observed by Judge Brown in *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1319 (5th Cir. 1970) *cert. denied*, 400 U.S. 991:

> It would be strange indeed if a summary judgment could not have collateral estoppel affect. This would reduce the utility of this modern device to zero. * * * Indeed, a more positive adjudication is hard to imagine.

While the motion before the Court in the prior action was for a "partial" summary judgment on the issues of the applicability of the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act and the general maritime law of the United States, these rulings were a constituent part of the final judgment, which was entered on the same day as the ruling on Defendants' Motion for Partial Summary Judgment. Thus, Plaintiff's attorney was immediately in a position to contest the District Court's ruling on the Jones Act issue and in fact did so. Twelve weeks after the Summary

Judgment was entered, the Plaintiffs filed a Motion for Relief pursuant to Rule 60(b), which was denied. The denial was appealed to the Fifth Circuit, where it was affirmed in an opinion by Judge Tate, *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983), a copy of which is attached hereto as Exhibit "B". Rehearing, rehearing *en banc*, and writ of certiorari were also subsequently denied. Prior to the Court's discussion of the scope of review available under Rule 60(b), the Court reported the District Court's action as follows:

> Adopting the logic and conclusions of a magistrate's memorandum and report as its own, the district court dismissed the plaintiffs' suit, finding on summary judgment:
>
> (1) that none of the plaintiffs was a Jones Act "seaman", under the test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and its progeny, entitled to invoke the Jones Act.

Defendants do not contest the fact that a proper Jones Act claim asserted in a State Court action cannot be removed under Section 1441 of Title 28. At the same time, a State Court plaintiff cannot prevent the removal of an action by attempting to assert claims and issues that have been finally resolved through judgment and appeal, and the relitigation of which is precluded by the doctrine of *res judicata*. Such a practice could lead only to chaos and anarchy.

II.

DIVERSITY JURISDICTION ATTACHES IF JONES ACT CLAIM IS PRECLUDED

In this cause, the Plaintiff has sued the same Defendants that were named in the previous federal action:

Exxon Corporation, Esso Tankers, Inc., and Exxon International Company, Inc. This Court has diversity jurisdiction over the matter under Section 1332 of Title 28, U.S.C. The applicable provisions of Section 1332 provide as follows:

> (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—
>
> * * *
>
> (2) Citizens of a state and citizens or subjects of a foreign state . . .

The Plaintiffs are, so far as Defendants are aware, citizens of the Republic of Singapore. Defendant Exxon Corporation is a corporation existing under the laws of the State of New Jersey, with its principal place of business in the State of New York. Exxon International Company, Inc. is an unincorporated division of Exxon Corporation. Esso Tankers, Inc. is a corporation existing under the laws of the Republic of Liberia with its principal place of business in the State of New Jersey. (See Amended Petition For Removal. The allegation contained in the Original Petition that Esso Tankers, Inc. maintained its principal place of business in the Republic of Liberia was, and is, incorrect.) Accordingly, both of the corporate Defendants are citizens of a state of the United States, namely New York or New Jersey.

Moreover, Paragraph I of the Plaintiff's Original Petition contains the averment that Esso Tankers, Inc. "operates solely as the alter ego of Exxon Corporation, and may be served with process by serving the Secretary

of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020." Thus, looking at the face of the Plaintiff's Petition, it is clear that Esso Tankers, Inc. is included in this action only because of its alleged relationship to Exxon Corporation, whose citizenship should be determinative for these purposes.

As for the citizenship of Exxon Corporation, the Court is referred to Judge Cox's opinion in *Exxon Corporation v. Duval County Ranch Company*, 406 F. Supp. 1367 (S.D. Tex. 1975), which contains an extensive discussion of the citizenship of Exxon Corporation in the specific context of a diversity issue. The court there states in pertinent part:

> The corporate headquarters for Exxon Corporation are in New York City, and the division headquarters for Exxon, U.S.A. are in Houston, Texas. All major business and financial decisions affecting the Exxon Corporation and its divisions are made in its New York headquarters. Tax returns for the entire Exxon Corporation are filed in New York. *Id.* at 1368.
>
> * * *
>
> [T]he citizenship of [Exxon Corporation] is New Jersey, the state of its incorporation, and New York, the state of its principal place of business. *Id.* at 1369, 1370.

Therefore the requirements of Section 1441 of Title 28 as well as the requirements of strict diversity are satisfied and the Court may properly exercise jurisdiction over this case. *See Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975).

It is clear that a petition which contains a Jones Act allegation may be removed if the Jones Act allegation is made in a fraudulent attempt to evade removal. *See Preston v. Grant Advertising, Inc.*, 375 F.2d 439 (5th Cir. 1967). Further, the trial court in determining whether a Jones Act allegation is fraudulently made to avoid removal may look beyond the allegations of the complaint filed in state court to the facts underlying those allegations. *Hale v. Tata Corporation*, 502 F. Supp. 502 (S.D. Tex. 1980). In this case, the Court should simply take judicial notice of the Order of Dismissal and Final Judgment entered in Civil Action Number H-78-477 and conclude that the question of Jones Act coverage has been precluded in this case.

III.

PLAINTIFFS CANNOT IN GOOD FAITH ALLEGE A CURRENTLY EXISTING CAUSE OF ACTION UNDER THE JONES ACT

Plaintiffs allege in their Motion to Remand that this cause should be remanded because the Plaintiffs have alleged a cause of action under the Jones Act, 46 U.S.C. § 688. In arguing that Jones Act claims may not be removed from state courts to federal courts, Plaintiffs admit that the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.*, is incorporated by reference in to (sic) the Jones Act. In order properly to allege a Jones Act cause of action, regardless of the underlying factual support, it at least must be alleged that the necessary elements for a Jones Act claim exist, as prescribed by the Jones Act itself and the FELA. Section 56 of the FELA requires that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of

action accrued." Though they must do so in order to avoid removal of their claim to federal court, Plaintiffs have not and cannot allege that this provision of the statute has been complied with. In fact, as is stated in Defendants' motion to dismiss this action, it has been more than six years since the decedent's death, which occurred on March 24, 1977. Plaintiffs therefore not only have not alleged the necessary facts to support a claims (sic) under the Jones Act, but in fact cannot allege such facts. Defendants would cite the Court to the Plaintiff's Original Complaint filed in the original litigation of this cause in the United States District Court for the Southern District of Texas which contains the indisputable statement that "on or about the 24th day of March, 1977, Leong Chong was killed while in the course and scope of his employment aboard the vessel ESSO WILHELM-SHAVEN." As any action under the Jones Act is indisputably time barred, the Jones Act does not preclude removal of this case to this Court.

IV.

PLAINTIFFS ARE PRECLUDED FROM REASSERTING LIABILITY ON THE PART OF THE DEFENDANTS UNDER THE JONES ACT BY THIS COURT'S PRIOR DECISION THAT THE PLAINTIFF'S DECEDENT DID NOT QUALIFY AS A JONES ACT SEAMAN

Plaintiffs spent a substantial amount of effort in their Motion to Remand attempting to persuade the Court that Judge McDonald's prior holding that the case should be dismissed pursuant to *forum non conveniens* does not preclude relitigation of the Jones Act issue in state court. This, however, ignores the fact that Judge McDonald's

summary judgment dismissal of certain issues in this case not only found that the case should be dismissed on the basis of *forum non conveniens* but also, separately, found "that none of the Plaintiffs was a Jones Act seaman, under the test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and its progeny, entitled to invoke the Jones Act." 699 F.2d 694. The potential effect of the *forum non conveniens* finding therefore becomes irrelevant in view of the more specific finding that the Plaintiff's decedent did not qualify as Jones Act seamen. Of course, any attempt by the Plaintiffs to argue that case law concerning the *res judicata* effect to be given *forum non conveniens* holdings is in any way instructive regarding the *res judicata* effect to be given to the Court's totally separate and specific finding that Plaintiff's decedent did not qualify as a Jones Act seaman would be and is grossly in error.

V.

INQUIRY INTO THE SUFFICIENCY OF THE ALLEGATIONS MADE IN A PLAINTIFF'S ORIGINAL COMPLAINT TO SUPPORT AN ACTION UNDER THE JONES ACT IS PROPERLY MADE BY A COURT CONSIDERING REMAND OF AN ACTION TO STATE COURT

Plaintiffs contend that the opinion in the case of *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979), prevents consideration by this Court of the *res judicata* effect of the prior judgment in this case or the fact that any Jones Act claim held by the Plaintiffs is now time barred. In actuality the *Yawn* case, together with other Fifth Circuit cases including *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980), fully supports the

proposition that a federal court making a determination of whether to remand a particular case to state court should make at least some inquiry into the allegations of the parties seeking to remand. Such inquiry would certainly encompass evidence that relitigation of the matter is barred by the doctrine of *res judicata* or that the Plaintiff's cause of action is time barred. Indeed, even in the *Yawn* case itself, the court conducted some investigation into the factual allegations made by the plaintiffs concerning the qualification of the employees as those employees entitled to recover under the Act, the alleged cause of the employees' injuries, and the kind of injuries incurred. Defendants herein require no such extensive consideration of the Plaintiff's factual allegations in this case, but merely request that the Court consider the legal questions surrounding the previously discussed *res judicata* and time bar issues in this case.

WHEREFORE, PREMISES CONSIDERED, Defendants Exxon Corporation and Esso Tankers, Inc. pray that the Court deny Plaintiff's Motion to Remand this cause to state court and that it have such other and further relief to which it may be justly entitled.

Respectfully submitted,

James Patrick Cooney
Attorney-in-Charge for Defendants
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was served on the Plaintiff's attorney Benton Musslewhite, Esq., of the Law Offices of Benton Musslewhite, Inc., 609 Fannin Street, Suite 517, Houston, Texas 77002, by hand delivery.

This ..... day of ....., 1984.

.....

Of Royston, Rayzor, Vickery & Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	CIVIL ACTION NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

MOTION TO DISMISS
AND FOR THE IMPOSITION OF SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Defendants in the above civil action and file this their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for sanctions against Plaintiff's attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure, and for cause thereof would show to the Court as follows:

I.

This civil action is barred under the doctrine of *res judicata*. On March 14, 1978, Plaintiff filed a civil action in this Court, being Civil Action No. H-78-477, styled *Chick Kam Choo, Individually and as Administratrix and/*

or Representative of the Estate of Leong Chong, and Next Friend of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Lan (sic) v. Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., in which a claim to recover for the wrongful death of Leong Chong was asserted. The present action is virtually identical to Civil Action No. H-78-477. A copy of Plaintiff's Original Complaint in Civil Action No. H-78-477 is attached hereto as Exhibit "A".

II.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in Civil Action No. H-80-78-477 by the Honorable Gabrielle McDonald. Copies of the Order of Dismissal and Final Judgment are attached hereto as Exhibits "B" and "C". In dismissing Civil Action No. H-78-477, the District Court adopted the Memorandum and Recommendation of United States Magistrate Platter filed on June 23, 1980, which concluded, *inter alia* that Plaintiff's decedent was not a seaman for the purposes of the Jones Act and that the case should be dismissed under the doctrine of *forum non conveniens*.

III.

Plaintiff's attorney did not file a timely appeal, but instead filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the District Court's Final Judgment. This motion was denied by way of a Minute Entry filed on December 8, 1981. Plaintiff filed a timely Notice of Appeal. The Court of Appeals for the Fifth Circuit affirmed the District Court's denial of relief under Rule 60(b) of the Federal Rules of Civil Procedure in *Chick Kam Choo v. Exxon Corp.*, 699

F.2d 693 (5th Cir. 1983). After petitions for rehearing and rehearing *en banc* were denied, the Plaintiff filed a petition for a *writ of certiorari* to the United States Supreme Court, which was denied on October 3, 1983, 104 S.Ct. 98 (1983).

On January 6, 1984, Plaintiff filed Cause No. 84-00125 in the 270th District Court of Harris County, Texas, which became the instant civil action upon timely removal.

IV.

Plaintiff's attorney-in-charge in Civil Action No. H-84-497 has been attorney-in-charge with regard to this matter since the filing of the motion to set aside this Court's judgment in the prior action.

V.

In any event, Plaintiff's cause of action for the death of her decedent, which occurred on March 24, 1977, over six years ago, is barred by all applicable statutes of limitation and by the doctrine of laches.

VI.

Under Rule 11 of the Federal Rules of Civil Procedure, as amended, it is provided:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other papers; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless

> increase in the cost of litigation . . . if a pleading, motion or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other papers, including a reasonable attorney's fees.

VII.

Because he served as attorney-in-charge in the previous civil action filed in behalf of the Plaintiff, the present attorney-in-charge had knowledge that the filing of the present civil action was not well grounded in fact and was not arranged by existing law in that the controversy had been fully litigated, a final judgment entered, and after exhaustive appeals, that any further prosecution of the Plaintiff's claim was barred by the doctrine of *res judicata*. In view of the flagrant disregard by Plaintiff's attorney-in-charge of his responsibilities under Rule 11 of the Federal Rules of Civil Procedure, Defendants request that Plaintiff's attorney-in-charge be directed to pay to the Defendants all of the reasonable expenses incurred because of the filing of the instant civil action, including reasonable attorneys' fees, and such other sanctions as the Court may deem appropriate.

WHEREFORE Defendants request that this civil action be dismissed for the reason that it is barred by the doctrine of *res judicata*, or, in the alternative, by the applicable statute of limitations or doctrine of laches, that sanctions be imposed upon Plaintiff's attorney-in-charge and that the Defendants have such other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ James Patrick Cooney
Attorney-in-Charge for Defendants
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

NOTICE OF SUBMISSION

To: Chick Kam Choo and her
attorney-in-charge Benton Musselwhite, Esq.
609 Fannin Street, Suite 517
Houston, Texas 77002

You are hereby notified that the above motion will be submitted to the Court on the 20th day of February, 1984, or as soon thereafter as may be practical.

/s/ James Patrick Cooney
Attorney for Defendants

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was served on the Plaintiff's attorney Benton Musselwhite, Esq., of the Law Offices of Benton Musselwhite, Inc., 609 Fannin Street, Suite 517, Houston, Texas 77002, by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 9th day of February, 1984.

/s/ James Patrick Cooney
Of Royston, Rayzor, Vickery &
Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	C.A. NO. H-84-497
vs.	)	
EXXON CORPORATION; ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' MOTION FOR IMPOSITION OF SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

I.

The Court should not consider the Defendants' motion to dismiss until *after* it has ruled on Plaintiffs' motion to *remand* to State court. *Bancochio Corp v. Fox*, 516 F.2d 29 (6th Cir. 1975).

II.

This civil action is not barred under the doctrine of res judicata. As the order of the United States District Court of March 14, 1978 in Cause No. H-78-477, clearly indicates, this cause was dismissed "without prejudice"

(see "Final Judgment" dated July 31, 1980). Therefore, the prior order of the District Court in Cause No. H-78-477 cannot any way be a bar to a subsequent proceeding nor can it constitute "res judicata".

III.

Moreover, under Rule 41(c), all dismissals with respect to "venue", such as a forum non conveniens dismissal, do not constitute "res judicata".

IV.

Moreover, there have been a number of Courts which have held a dismissal on grounds of forum non conveniens in Federal Court does not bar a subsequent filing of the same cause of action in State Court; indeed, the State Court may decide whether or not it will retain venue and if it so decides it is not barred by the prior determination of the federal Court that it would not retain venue. *Boskoff v. Bocing Company*, 16 AV. L.Rep. (CCH) 17,753 (Sup.Ct. N.Y. 1981); *Kahn v. United Techonlogies Corporation*, 16 AV. L.Rep. (CCH) 17,751 (Sup.Ct. Conn. 1981); *Aboujdid v. Gulf Aviation Company, Ltd.*, 108 Misc.2d 175 (Sup.Ct., 1980) aff'd, 448 N.Y.S.2d 427 (First Dept. 1982).

V.

In addition, the question of whether or not a person is a seaman is generally one of fact. *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975); and *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). Thus, there is nothing about the prior order of dismissal of the Federal Court that constitutes res judicata to any extent.

VI.

Since the only grounds for the present dismissal of the Defendants is on the basis of "res judicata" and since it is obvious that this ground is not well taken, the motion to dismiss should be in all things denied. In addition since it is obvious that the motion to dismiss and for sanctions was filed on a frivolous basis, not only should the motion to impose sanctions be denied, but the Court should, indeed, impose sanctions upon counsel for the Defendants, charge costs to such Defendants and enter an order for attorneys fees in favor of the Plaintiff's counsel.

VII.

That with respect to Plaintiffs' response to Defendants' motion to dismiss and for sanctions, Plaintiff incorporates all briefs, depositions, other evidence and matters filed on behalf of Plaintiffs in the Houston federal court prior proceeding and adopts all of said depositions, pleadings and briefs filed with respect to said forum non conveniens question and question of whether or not the Plaintiff was a seaman and incorporate them herein by reference, as if copied verbatim herein. Plaintiff moves the Court to enter an order allowing the filing of such briefs, petitions, motions, depositions and the like, should the Court not immediately remand this case, as the Plaintiffs respectively believe it should.

WHEREFORE, Plaintiffs request that the Defendants motion for sanctions and for dismissal be in all things denied and that the Court impose sanctions upon the counsel for the Defendants by ordering such counsel to pay attorneys fees to counsel for Plaintiffs and costs of these proceedings.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: /s/ Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was forwarded, via Certified Mail, Return Receipt Requested, to Mr. James Patrick Cooney of Royston, Rayzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002, on this the 20th day of February, 1984.

/s/ Benton Musslewhite

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed May
EXXON CORPORATION, et al.	)	15, 1984)
	)	
Defendants.	)	

ORDER & FINAL JUDGMENT

On April 6, 1984 came on to be heard Plaintiffs' motion for removal and Defendants' motion to dismiss and for the imposition of sanctions. From a consideration of the motions and the evidence submitted in this cause, and based upon the findings entered into the record on April 6, 1984, it is the opinion of this Court that Plaintiffs' attorney brought this case in bad faith and that it should be dismissed. It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs' motion to remand is DENIED and Defendants' motion to dismiss is GRANTED. It is further ordered that Defendants' motion for the imposition of sanctions against Plaintiffs' attorney Benton Musselwhite pursuant to Rule 11 of the Federal Rules of Civil Procedure is GRANTED. Accordingly Mr. Musselwhite shall pay to Defendants $4,749.00 as reasonable attorney's fees and $131.92 for costs of court, for a total of $4,880.92. subject to the payment of interest at the rate of 11.74 percent from the date of signing until the date of payment. This amount repre-

sents expenses incurred by Defendants in the defense of this matter.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of May, 1984.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.,	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed August
EXXON CORPORATION, et al.,	)	16, 1985)
	)	
Defendants.	)	

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit which vacated the final judgment previously entered by this Court, it is hereby ORDERED, ADJUDGED and DECREED that this lawsuit is remanded to the DISTRICT COURT OF HARRIS COUNTY, 270th Judicial District of Texas, Cause No. 84-00125, for want of jurisdiction pursuant to 28 U.S.C. § 1447(c).

Done at Houston, Texas, this 16th day of August, 1985.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.,	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed August
EXXON COPORATION, et al.,	)	16, 1985)
	)	
Defendants.	)	

FINAL JUDGMENT

For the reasons set out in the Court's Order of Remand entered this date, the above styled action is hereby REMANDED to the District Court of Harris County, 270th Judicial Court of Texas, Cause No. 84-00125 upon the docket of said Court.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 16th day of August, 1985.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. H-86-606
CHICK KAM CHOO,	)	
ETC., ET AL.	)	

COMPLAINT FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Petitioners, and file this their Complaint for Injunctive Relief to enjoin Defendants Chick Kam Choo, Individually and as the Administratrix and/or Representative of the Estate of Leong Chong, Deceased, and as next friend of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Tan, and her attorneys of record Benton Musslewhite, Esq. and Joseph C. Blanks, Esq., from attempting to relitigate Civil Action No. H-78-477 in the courts of the State of Texas after final judgment has been entered by this Court and would show to the Court as follows:

I.

This action arises under Section 1651(a) of Title 28, U.S.C. This Court's jurisdiction to protect its own judgments is supplemental to the jurisdiction it possessed over the original civil action and no other basis of jurisdiction is required.

II.

Chick Kam Choo is an individual who is not a resident of the State of Texas, but who is doing business in the State of Texas within the meaning of the Texas Long Arm Statute and may be served through Benton Musslewhite, who is the person in charge of her business within the State of Texas at this time. Benton Musslewhite may be served at 608 Fannin Street, Suite 517, Houston, Texas 77002, and Joseph C. Blanks can be served at 1119 First Texas Building, 470 Orleans Street, Beaumont, Texas 77701.

III.

On March 14, 1978, Defendant Chick Kam Choo filed a civil action in this Court being Civil Action Number H-78-477, styled CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN vs. EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC., in which a claim to recover for the wrongful death of Leong Chong was asserted. Defendant has now filed a virtually identical action in the District Court of Harris County, Texas. A copy of the Defendant's Original Complaint in Civil Action Number H-78-477 is attached hereto as Exhibit "A".

IV.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in Civil Action Number H-78-477 holding, *inter alia*, that Defendant's decedent was not a

Jones Act seaman as a matter of law and dismissing the wrongful death action asserted pursuant to the federal maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore. Copies of the Order of Dismissal and the Final Judgment are attached hereto as Exhibits "B" and "C".

V.

Defendant Chick Kam Choo did not file a timely appeal from this Court's Final Judgment of July 31, 1980, but acting through her attorney, Benton Musslewhite, filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and a notice of appeal was filed. The United States Court of Appeal for the Fifth Circuit affirmed the District Court's denial of relief under Rule 60(b) in *Chick Kam Choo v. Exxon Corp.*, 696 F.2d 693 (5th Cir. 1983). After petitions for rehearing and rehearing en banc were denied by the Fifth Circuit, the Defendant Chick Kam Choo, acting through her attorney Benton Musslewhite, filed a petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 3, 1983, 104 S.Ct. 98 (1983).

VI.

On January 6, 1984, the Defendant Chick Kam Choo, again acting through her attorney Benton Musslewhite, filed an Original Petition in the 270th Judicial District of Harris County, Texas (Cause No. 84-00125), which was substantially identical to the Complaint filed in Civil Action No. H-78-477. A copy of the Original Petition in Cause No. 84-00125 is attached hereto as Exhibit "D".

Cause No. 84-00125 was removed to this Court on grounds of diversity of citizenship and alienage jurisdiction and assigned Civil Action No. H-84-497. This Court denied Defendants' motion to remand the case and granted Plaintiffs' motion to dismiss. Defendant filed its notice of appeal to the Fifth Circuit on June 12, 1984. On July 8, 1985 the Fifth Circuit issued its opinion holding that the necessary subject matter jurisdiction was lacking and vacated and remanded case with instructions that it be remanded to state court. The order remanding the case was entered in (sic) August 16, 1985.

VII.

The Defendants Benton Musslewhite and Joseph C. Blanks are the attorneys of record in Cause No. 84-00125 pending in the 270th Judicial District Court of Harris County, Texas. The claims asserted by the Original Petition filed by the Defendants in Cause No. 84-00125 in the 270th District Court are substantially identical to the claims asserted in Civil Action No. H-78-477 and constitute a blatant attempt on the part of the Defendants to relitigate those claims and to thereby avoid the effect of the Final Judgment entered in Civil Action No. H-78-477 by this Court. Therefore, this Court is empowered pursuant to Sections 1651 and 2283 of Title 28, U.S.C., to grant a permanent injunction to enjoin the Defendants from seeking to relitigate in any state forum the issues finally decided in Civil Action No. H-78-477 in order "to protect or effectuate its judgments."

VIII.

Petitioners Exxon Corporation and Esso Tankers, Inc. will suffer irreparable harm if the injunctive relief

requested herein is not granted in that they will be required to relitigate at their peril issues that have been finally decided in Civil Action No. H-78-477.

VII. (sic)

Petitioners Exxon Corporation and Esso Tankers, Inc. have no adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc. respectfully request that they be granted temporary, preliminary and permanent injunctive relief enjoining the Defendants, or any other attorney acting in their behalf, from attempting to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or future State Court proceeding and that the Petitioners herein have such other and further relief to which they may be justly entitled.

Respectfully submitted,

.....

James Patrick Cooney
Attorney in Charge for Plaintiffs
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared James Patrick Cooney, who being duly sworn on oath says:

I am a member of the firm of Royston, Rayzor, Vickery & Williams and attorney in charge for the Petitioner. I have read the foregoing Complaint and know the contents thereof, and the same are true and correct.

.....

James Patrick Cooney

SUBSCRIBED AND SWORN TO BEFORE ME, on this ..... day of ....., 1986.

.....

Notary Public in and for
Harris County, TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	CIVIL ACTION
	)	No. H-86-606
vs.	)	
	)	(Filed March
CHICK KAM CHOO, ET AL.	)	7, 1986)

RESPONDENTS' MOTION TO DISMISS

Come Respondents Chick Kam Choo, et al. and, subject to the defenses raised herein, including lack of *in personam* jurisdiction, file their Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, showing the Court:

LACK OF SUBJECT MATTER JURISDICTION

This Honorable Court is without jurisdiction of the subject matter of this cause. The Petition concerns a civil action pending in State Court, heretofore removed to this same Honorable Court and thereafter ordered remanded by the United States Court of Appeals for the Fifth Circuit. The Court held that no subject matter jurisdiction existed as between these parties. No new issues have been introduced or change of parties such as would create subject matter jurisdiction. The dispute is one between aliens on one side and alien and citizen on the other. No federal question exists and diversity jurisdiction is destroyed by the juxtaposition of aliens as parties.

LACK OF JURISDICTION OVER THE PERSON

Chick Kam Choo and the other individuals named in the Petition, save attorneys Musslewhite and Blanks, are

not and have never been within the State of Texas. They do no business in the State within the meaning of the Texas Long Arm Statute. They are resident citizens of Singapore, having no property in Texas and no connection therewith other than their long frustrated attempt to adjudicate their claims against the Petitioners for the wrongful death of their decedent caused by the negligence of the Petitioners. The Court has no jurisdiction over their persons. To assert same is a violation of the due process clause of the Constitution of the United States.

PROCESS AND SERVICE THEREOF ARE INSUFFICIENT

No process has been served upon Chick Kam Choo or the other Singapore Respondents. Benton Musslewhite is not their agent for service of process and service upon him or upon Joseph C. Blanks is no service at all as to the Singapore residents.

PETITIONERS' FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Anti-Injunction Act, prohibits the issuance of a writ of injunction to stay proceedings in any Court of a State, "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The act of Congress relied upon by Petitioners, 28 U.S.C. 1651, only authorizes the issuance of such writs "necessary or appropriate in aid of [the Courts'] jurisdictions and agreeable to the usages and principles of law." The Court of Appeals has held that this Court has no jurisdiction over the parties in this cause. Because this Court has no jurisdiction to aid respecting these parties, 28 U.S.C. 1651 has no relevance.

There is no need for this Honorable Court to "effectuate its judgment" as to this cause. To the extent that the original judgment of the Federal Court has *res judicata* effect on Respondents' State Court action, the Petitioners can raise it there. To suggest that Petitioners Exxon Corp. and Esso Tankers, Inc. will suffer irreparable harm by having to file a brief motion for partial summary judgment on the grounds of *res judicata* is nonsense.

No action has been taken by the District Court of Harris County that can be in the least construed as contradictory or injurious of the judgment entered in H-78-477. No reason exists to believe that such will happen. And until or unless the State Court acts so as to ineffectuate this Court's judgment, the issuance of a writ is neither necessary nor appropriate. To the contrary, it is prohibited by law. Petitioners, therefore, have failed to state a claim for relief.

WHEREFORE, PREMISES CONSIDERED, Respondents pray the Court grant their motion to dismiss all other relief to which they show themselves justly entitled.

Respectfully submitted,

Original Signed By
Joseph C. Blanks
Joseph C. Blanks, P.C.
470 Orleans Suite 1119
Beaumont, Texas 77701
(409) 833-2245
TexBarNo. 02456770

Certificate of Service

A true copy of the above was hand delivered to all counsel 3/7/86

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP, ET AL.	)	
	)	CIVIL ACTION
VS.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

ORDER

CAME ON THIS DAY to be heard the motion of Respondents Chick Kam Choo, et al., Motion to Dismiss Pursuant to Rule 12(b), in the above styled and numbered cause, and the Court, having considered the motion, is of the opinion that and it is, therefore

ORDER, ADJUDGED, and DECREED that the motion of Respondents be and is hereby granted and this cause is hereby dismissed with prejudice.

SIGNED and ENTERED this the ..... day of March, 1986.

.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	CIVIL ACTION
vs.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Plaintiffs herein, and file this their Opposition to Defendants' Motion to Dismiss and would show to the Court as follows:

I.

SUBJECT MATTER JURISDICTION

As pointed out in Plaintiffs' Complaint for Injunctive Relief, the Court's jurisdiction is supplemental or ancillary to the jurisdiction it possessed over the original action and that no other independent ground of jurisdiction is required. *Dugas v. American Surety Co.*, 300 U.S. 414, 418 (1937); *Southwest Airlines, Co. v. Texas International Airlines*, 546 F.2d 84, 90 (5th Cir. 1977). There is no question but that the requisite subject matter jurisdiction was present in Civil Action No. H-78-477. Since the present action is supplemental or ancillary to the original action, subject matter jurisdiction is present here.

II.

JURISDICTIOIN OVER THE PERSON

Service was made on the Plaintiff through her attorney Benton Musslewhite pursuant to Sec. 17.043 of the

Texas Civil Practice and Remedies Code (Supp. Pamphlet: 1985), which provides:

> In an action arising from a nonresident's business in this state, process may be served on the person in charge, at the time of service, of any business in which the nonresident is engaged in this state if the nonresident is not required by statute to designate or maintain a resident agent for service of process.

Under Sec. 17.042, "a nonresident does business in the state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state."

Quite clearly, Chick Kam Choo, an undisputed nonresident, entered into a contract with her attorney, Benton Musslewhite, performable by the filing of one or more lawsuits in the State of Texas. Given the attorney-client relationship and the absence of the Defendant Chick Kam Choo from the state, it is clear that Mr. Musslewhite is the person in charge of her business in the State of Texas. It is submitted then that jurisdiction over the person of the Defendant Chick Kam Choo was properly obtained by personal service on the person in charge of his business in the State of Texas, Benton Musslewhite. If there should be any doubt on this point, the Plaintiffs respectfully request an opportunity to present additional evidence as to the relationship between Mr. Musslewhite and his client Chick Kam Choo.

III.

A CLAIM UPON WHICH RELIEF
CAN BE GRANTED

There can be no question that Plaintiffs' Complaint for Injunctive Relief states a claim upon which relief can

be granted. In three recent cases involving substantially identical facts, permanent injunctive relief has been granted against Mr. Musslewhite enjoining him from attempting to relitigate in Texas state courts claims originally brought in federal court in behalf of foreigners and finally dismissed under the doctrine of *forum non conveniens*. *Texaco Inc. v. Musslewhite, et al.*, Civil Action No. S-85-168-CA (E.D. Tex. February 28, 1986); *Sherrill v. Brikerhoff Maritime Drilling*, Civil Action Nos. C-82-0836-WWS and C-82-2563-WWS (N.D. Calif. January 30, 1986) appeal pending; *In Re: Ocean Ranger, Sinking Off Newfoundland On February 15, 1982* (MDL Docket No. 508, August 14, 1985) *on appeal* pending (Copies of these opinions are attached hereto).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Exxon Corporation and Esso Tankers, Inc., respectfully request that Defendants' Motion to Dismiss be denied.

Respectfully submitted,

/s/ James Patrick Cooney
2200 Texas Company Tower
Houston, Texas 77002
713/324-8380
Attorney in Charge for Plaintiffs,
Exxon Corporation and
Esso Tankers, Inc.

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on opposing counsel, Joseph C. Blanks, Esq., 470 Orleans, Suite 1119, Beaumont, Texas

77701, by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 3rd day of March, 1986.

/s/ James Patrick Cooney
Of Royston, Rayzor, Vickery & Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	CIVIL ACTION
VS.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

ORDER

CAME ON THIS DAY to be heard the Defendants Chick Kam Choo, et al., Motion to Dismiss Pursuant to Rule 12(b), in the above styled and numbered cause, and the Court, having considered the motion, is of the opinion that it is, therefore

ORDERED, ADJUDGED, and DECREED that the motion of Defendants be and is hereby denied.

SIGNED and ENTERED this the ..... day of ....., 1986.

.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION AND ESSO TANKERS, INC.	)	
vs.	)	
CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE AND JOSEPH C. BLANKS	)	CIVIL ACTION NO. H-86-606

MOTION FOR SUMMARY JUDGMENT AND
APPLICATION FOR PERMANENT
INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Petitioners herein, and file this their Motion for Summary Judgment and Application for Permanent Injunctive Relief pursuant to Rules 56 and 65 of the Federal Rules of Civil Procedure and show to the Court as follows:

I.

Plaintiffs have filed their Complaint for Injunctive Relief seeking to enjoin and restrain the Defendant Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks from attempting to relitigate the issues finally determined in Civil Action No. H-78-477, in which

a Final Judgment was entered by this Court on July 31, 1980.

II.

Defendants are presently prosecuting Cause No. 84-00125 in the 270th Judicial District of Harris County, Texas, which cause is substantially identical to Civil Action No. H-78-477, which was finally decided by this Court in 1980.

III.

There is no genuine issue of material fact. There can be no question that Civil Action No. H-78-477 decided by this Court in 1980 and Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, both represent attempts to recover for the wrongful death of Leong Chong who was killed while working aboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs in Singapore. The Plaintiffs in this action were defendants in C. A. No. H-78-477 and are defendants in Cause No. 84-00125 (Exxon International Company, Inc., while named as a party in both actions is in fact an unincorporated division of Exxon Corporation). Thus, both the parties and the underlying claim are identical. Finally, there can be no doubt that the Plaintiffs are exposed to irreparable harm if injunctive relief is not granted and that they lack an adequate remedy at law. After having litigated this matter through a final judgment, appeal and the denial of an application for writ of certiorari to the United States Supreme Court, the Plaintiffs should not be exposed to the vexation and uncertainty of being required to relitigate this matter in State Court, particularly now that approxi-

mately nine years have passed since the death of Leong Chong.

IV.

Plaintiffs are entitled to injunctive relief protecting them from the possibility of relitigating this matter as a matter of law. This Court is empowered to protect and effectuate its judgments under the All Writs Statute, 28 U.S.C. § 1651(A), which provides:

> **The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.**

Under the All Writs Statute federal courts are empowered to enjoin a party from attempting to relitigate a matter in state court that has been finally determined by the federal court. *Texas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1266 (5th Cir. 1969). *See Bank of Heflin v. Miles*, 621 F.2d 108 (5th Cir. 1980); *Seaboard Coast Line R. Co. v. Union Comp Corp.*, 613 F.2d 604 (5th Cir. 1980); *Southwest Airlines v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977).

Furthermore, the Anti Injunction Act, 28 U.S.C. § 2283 in no way prohibits the enjoining of relitigation in state court of a matter finally determined in federal court. In fact, such injunctive relief is specifically allowed under the relitigation exception to the Act, which permits a federal court to enjoin a state court action "where necessary in aid of its jurisdiction or to protect or effectuate its judgments." *Parsons Steel, Inc. v. First Alabama Bank, et al.*, — U.S. — 44 U.S.L.W. 4144 (January 27, 1986).

In three district court cases, the Defendant Mr. Musslewhite has been permanently enjoined from attempting to relitigate in the courts of the State of Texas actions originally brought in behalf of foreign claimants in federal court and finally determined under the doctrine of *forum non conveniens*. *In re OCEAN RANGER*, Multidistrict Litigation Docket No. 508, Section C, Minute Entry dated August 14, 1985, *appeal pending* (a copy of which is attached as Exhibit "A"); *Sherrill v. Brinkerhoff Maritime Drilling*, Nos. C-82-0836 WWS and C-82-2565 WWS, N.D. Cal.; Findings of Fact and Conclusions of Law, Injunction and Final Judgment, January 31, 1986, *appeal pending* (a copy of which is attached as Exhibit "B"); *Texaco v. Benton Musslewhite, et al.*, C. A. No. S-85-168-CA, E.D. Tex. Injunction February 28, 1986 (a copy of which is attached as Exhibit "C"). Each of these cases present a situation essentially identical to the situation here and in each instance the district court granted permanent injunctive relief to prevent the litigation in state courts of claims finally dismissed under the doctrine of *forum non conveniens* by a federal court. These cases mandate the entry of permanent injunctive relief in this case, for to do otherwise would allow the total disregard of a final judgment of this Court.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc. respectfuly request their Motion for Summary Judgment be granted and that the Defendants Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be permanently enjoined from prosecuting or commencing any causes of actions or claims in the State of Texas or any other states which seek to relitigate any of the issues decided in Civil Action

No. H-78-477 regarding the wrongful death of Leong Chong which occurred aboard the tanker ESSO WILHELMSHAVEN on or about March 24, 1977 in Singapore, and that the Plaintiffs receive their reasonable attorneys' fees and costs and such other relief as may be just.

Respectfully submitted,

By: .....

James Patrick Cooney
Attorney in Charge
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Plaintiffs,
Exxon Corporation and
Esso Tankers, Inc.

OF COUNSEL:

RAYSTON, RAYZOR, VICKERY & WILLIAMS

VERIFICATION

STATE OF TEXAS)
)
COUNTY OF HARRIS)

Before me, the undersigned authority on this day personally appeared James Patrick Cooney, who being duly sworn on oath says: "I am a member of the firm of Royston, Rayzor, Vickery & Williams and attorney in charge for the Plaintiffs. I have read the foregoing Motion for Summary Judgment and Application for Permanent Injunctive Relief and know the contents thereof and the same are true and correct."

James Patrick Cooney

SWORN TO and SUBSCRIBED BEFORE ME, on this — day of ———, 1986.

Notary Public in and for
Harris County, TEXAS

NOTICE OF SUBMISSION

Please take notice that this Motion for Summary Judgment and Application for Permanent Injunctive Relief will be submitted to the Court for its consideration on Monday, the — day of ———, 1986.

CERTIFICATE OF SERVICE

I hereby certify that on this — day of ———, 1986, a true and correct copy of the foregoing Motion for Summary Judgment and Application for Permanent Injunctive Relief was mailed to Joseph C. Blanks, P.C., 1119 First Texas Building, 4717 Orleans, Beaumont, Texas 77701, and Benton Musslewhite, Esq., 609 Fannin, Houston, Texas 77002, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED.

Of Royston, Rayzor, Vickery
& Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION, ET AL.	)	CIVIL ACTION
	)	NO. H-86-606
vs.	)	
	)	(Filed May
CHICK KAM CHOO, ET AL.	)	14, 1986)

RESPONDENTS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR PERMANENT INJUNCTIVE RELIEF

COME NOW Respondents CHICK KAM CHOO et al. and file their response to the Motion for Summary Judgment and Application for Permanent Injunctive Relief of Petitioners EXXON CORP. and ESSO TANKERS, INC. in the above styled and numbered cause, showing the Court:

Petitioners seek by way of a permanent injunction to prevent the Defendants and their attorneys from relitigating the issues finally determined in Civil Action No. H-78-477 in which a Final Judgment was entered by United States District Judge Gabriel McDonald on July 31, 1980. They insist that there is no genuine issue of material fact. Moreover, Petitioners ignore the ruling of the United States Court of Appeals for the Fifth Circuit that this Court is without jurisdiction of this cause. That judgment resulted when they previously invoked the jurisdiction of this Court by the removal of cause No. 84-00125 from the 270th Judicial District Court of Harris County, Texas approximately two years ago. While accusing these Defendants of seeking two bites from the apple, Exxon and Esso are doing precisely that themselves.

The Issues Finally Adjudicated in H-78-477

Defendants urge the Court to review the Order of Dismissal upon which Petitioners predicate their prayer for injunctive relief. The Report of Magistrate Platter, adopted by Judge McDonald, granted summary judgment for the Petitioners herein as to the Jones Act, Death on the High Seas Act, Longshoremen's & Harbor Workers' Compensation Act, and arguably the General Maritime Law claims of these Defendants. The Court then exercised its discretion and declined to retain jurisdiction of the cause, dismissing the remaining claims under the doctrine of *forum non conveniens.*

The only causes of action which C.K. Choo et al. are barred from relitigating are those on which summary judgment was entered. As to what those issues are, there is no genuine issue of material fact. Respondents raise no objection to the Court entering an order that precludes relitigation of those causes of action, but note that as to those issues, no controversy exists because no such claims are raised in the Harris County cause.

Respondents vigorously oppose, however, any effort to prevent them from pursuing their wrongful death claims against Exxon and Esso. Those causes of action were clearly not adjudicated in an earlier proceeding, except to the extent of a ruling by the Court of Appeals that this Court is without subject matter jurisdiction over them. The only ruling by the District Court pertaining to those causes of action was its refusal to retain jurisdiction based on *forum non conveniens.*

The refusal of a federal Court to retain jurisdiction in a case involving *forum non conveniens* has no *res ju-*

dicata effect in a later proceeding. To become eligible for *res judicata* effects, a judicial action need achieve a minimum quality, i.e., the judgment must be valid, final, and on the merits. 18 C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4427, p. 269 (1975 & Supp. 1985). The judgment on which Petitioners rely is valid and it is final, so far as it goes. But the judgment is manifestly not a ruling on the merits of the Texas or Singapore law claims. Nor does it appear to be a ruling on the general maritime law claims.[1] The initial dismissal of the above claims was on grounds that did not go to the merits of the claims. Moreover, it was not intended to preclude a second action. Clearly, Judge McDonald's order contemplated a second action in a non-federal forum.

No Bar to Relitigating Claims Dismissed for *Forum Non Conveniens*

Like a dismissal for want of justiciability, want of jurisdiction, or mootness, a dismissal for *forum non conveniens* does not constitute a final adjudication on the merits. It is frivolous to contend that such a determination precludes a second action on the same claim. *See Payne*

---

[1] The Report of Magistrate Platter was ambiguous as to the general maritime law claims. The Report discussed the Jones Act, DOHSA, and L&HWCA claims individually. It concluded that Plaintiffs failed to state a claim under any of the three theories. All discussion of general maritime law was in conjunction with Texas statutes and other claims strictly in the context of a maritime *forum non conveniens* analysis. The District Judge disposed of the general maritime law claims by summary judgment, however, and did not enumerate the claims dismissed under the doctrine of *forum non conveniens*.

v. Panama Canal Co., 607 F.2d 155, 158 (5th Cir. 1979) (dismissal of prior action as moot, without prejudice); *Continental Casualty Co. v. Canadian Universal Insur. Co.*, 605 F.2d 1340, 1343 (5th Cir. 1979), *cert. denied* 455 U.S. 929 (vacation of prior judgment for want of justiciable controversy was for want of jurisdiction).

The trial court decided only that, as a matter of discretion, it would not hear the case. The grounds for that decision were, first, that U.S. law did not apply under federal maritime choice of law rules; and, second, that the U.S. District Court for the Southern District of Texas was an inconvenient forum for trial of the cause. Under the doctrine of direct estoppel, the two above *issues* might be precluded from being reopened in a second action, even though the *claims* can be renewed in a second action that covers the defects of the first. 18 C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4418, p. 171 (1975 & Supp. 1985).

"Dismissal on *forum non conveniens* grounds does not establish claim preclusion; ordinarily it cannot work issue preclusion as to other courts because the convenience issues are intrinsically different, but issue preclusion is appropriate if the issues remain the same." *Id.*, § 4436, p. 346.

The *res judicata* effect of Judge McDonald's judgment, at least as regards the Texas or Singapore law claims, is the preclusion of two issues: first, choice of foreign law under federal maritime jurisdiction; and second, that jurisdiction will not be exercised by this federal forum under *forum non conveniens* rules.

Petitioners are therefore barred by the *res judicata* principle of direct estoppel from seeking relief in this Court. Their insistence that this Court exercise jurisdiction contradicts the decision they won from Judge McDonald, and the ruling of the Court of Appeals that this Court is without jurisdiction over this cause.

In effect, Petitioners urge this Court to impose upon the Courts of the State of Texas a doctrine foreign to Texas law and a determination that was purely discretionary with Judge McDonald. Clearly, a Texas Court is not bound by that decision. This is so because dismissals for *forum non conveniens*

> involve deliberate refusals to decide the substantive issues presented. No apparent reason exists to justify forfeiture of the underlying claims upon a mistaken choice of tribunal. As previously suggested, then, a Court that orders dismissal on these grounds should not have any discretion to direct that the dismissal will preclude a second action on the same claim.

18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4436, p. 347 (1975 & Supp. 1985), citing RESTATEMENT SECOND OF JUDGMENTS § 20, comment d (1981). That is, however, precisely the result Petitioners seek: a ruling that the initial dismissal of this cause in federal court precludes a second action on the same claim in state court.

In an analagous situation, although with the relative positions of the state and federal courts reversed, the Supreme Court held that "a prior state court dismissal on the grounds of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power

vested in him by Congress to rule upon a motion to transfer under § 1404(a)." *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 73-74 (1963).[2]

The Supreme Court noted that *forum non conveniens* analysis under state law was in many respects similar to the considerations applied by a federal court in ruling on a § 1404(a) motion.

> The discretionary determinations of both the state and federal courts in this case required, to be sure, evaluations of similar, but by no means identical, respective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation presented here.

Parsons, 375 U.S. at 72-73.

The considerations discussed by the Court "no more than illustrate the many variables which might affect the exercise of discretion by a state court, as contrasted to a federal court, in any given case. Since different factual considerations may be involved in each court's determination . . ." the Court held the prior dismissal for *forum non conveniens* did not compel the second court to decline jurisdiction. *Id.* at 73.

---

[2] The Plaintiffs, dismissed by the state court on the ground of *forum non conveniens*, refiled the same claim, in the same city, in federal court. The district judge denied Defendants' motion to transfer the cause to the out of state forum implicitly approved by the state court. The Court of Appeals issued a writ of mandamus directing the transfer. 307 F.2d 924 (7th Cir. 1962). The Supreme Court reversed the Court of Appeals.

No apparent reason exists to require an opposite result in this cause, even though the positions of the courts are reversed. The Texas court is no more bound by this Court's exercise of discretion than was the federal court in *Parsons* bound by the state court's discretionary refusal to exercise jurisdiction.

Indeed, even in actions prosecuted solely in the federal system, courts have refused to preclude relitigation of the ***forum non conveniens*** issue in actions refiled in a different district. One decision emphasized what is significant in this cause: that the first court decided only that, as a matter of discretion, it would not hear the case; it did not decide the convenience factors that were relevant in a different forum. *Mizokami Bros. v. Mobay Chemical Co.*, 660 F.2d 712, 715-17 (8th Cir. 1981). *But see Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977).

Without waiving their motion to dismiss for lack of jurisdiction, the Defendants urge the Court to deny the motion for summary judgment of Petitioners and deny them the injunctive relief sought for the reason that there is no justification for denying the Plaintiffs in cause No. 84-00125 from pursuing those causes of action not subject to the summary judgment of this Court. Because the dismissal for *forum non conveniens* by this Court was discretionary and did not preclude relitigation in a nonfederal forum, that ruling has no *res judicata* effect and does not bar prosecution of the unlitigated claims in State court.

WHEREFORE, PREMISES CONSIDERATED, Respondents pray the Court deny the motion for summary judgment of Petitioners, dismiss this cause for lack of

jurisdiction, and grant Respondents all other relief to which they are entitled, including costs and attorneys fees.

Respectfully submitted,

/s/ Joseph C. Blanks, P.C.
1119 First Texas Building
470 Orleans
Beaumont, Texas 77701
(409) 833-2249
Texas Bar No. 02456770

CERTIFICATE OF SERVICE

A true copy of the above has been sent to all attorneys of record May 13, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION AND ESSO TANKERS, INC.	)	
vs.	)	
CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE and JOSEPH C. BLANKS	)	CIVIL ACTION NO. H-86-606 (Filed May 15, 1986)

INJUNCTION AND FINAL JUDGMENT

The Motion for Summary Judgment and Application for Permanent Injunctive Relief of Exxon Corporation and Esso Tankers, Inc. for injunctive relief to enjoin Chick Kam Choo and her attorneys of record, Benton Musslewhite and Joseph C. Blanks, Defendants, from any attempts to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or subsequent State Court proceeding having come on to be heard, and it appearing that the Defendants are attempting to relitigate issues previously decided by this Court in Civil Action No. H-78-477 in Cause No. 84-00125 in the 270th District Court for Harris County, Texas, and that such relitigation will cause irreparable damage to the Petitioners by requiring them to relitigate issues that have been finally decided and are now precluded, it is

ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against Exxon Corporation and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them.

Further ORDERED, that the Plaintiffs recover their reasonable attorneys' fees as subsequently determined by the Court along with their costs.

SIGNED at Houston, Texas, this 15th day of May, 1986.

/s/ Norman Black
United States District Judge

Supreme Court, U.S.
FILED
JAN 11 1988
SPANIOL, JR.
CLERK

No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

JOEL I. KLEIN
DAVID BOYD
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

BENTON MUSSELWHITE
609 Fannin, Suite 517
Houston, TX 77002
(713) 222-2288
Counsel of Record

JOSEPH C. BLANK
1119 First Texas Building
470 Orleans Street
Beaumont, TX 77701
(409) 833-2245
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act, 18 U.S.C. § 2283, precludes a federal district court from enjoining a state court admiralty proceeding on the grounds that the federal court has previously dismissed the case on grounds of federal *forum non conveniens.*

2. Whether, assuming that a federal court has the power to enjoin the maintenance of a state court action when the case has previously been dismissed in the federal courts on *forum non conveniens* grounds, principles of equity, comity and federalism require that the case be allowed to proceed in the state court so that it can determine the scope of its own *forum non conveniens* doctrine and accommodate any possible federal interests at issue.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE ANTI-INJUNCTION ACT ESTABLISHES A JURISDICTIONAL BAR TO FEDERAL INJUNCTIONS OF STATE COURT PROCEEDINGS IN ALL BUT THREE NARROWLY-DEFINED CIRCUMSTANCES, NONE OF WHICH ARE APPLICABLE HERE	12
A. The District Court In the Initial Action Never Even Considered, Let Alone Decided, Whether The Texas Courts Would Have Or Could Have Entertained This Case	15
B. The Relitigation Exception Does Not Apply In Any Event Since It Only Authorizes Injunctions To Protect Final Judgments That Have Established The Substantive Rights Of The Parties Regarding The Merits Of The Case Or Controversy At Issue	22
C. The Injunction Cannot Be Justified As Necessary To Protect A Federal Concern That Would Preempt The State Courts From Reaching A Contrary Determination	27

TABLE OF CONTENTS—Continued

	Page
II. PRINCIPLES OF EQUITY, COMITY AND FEDERALISM PRECLUDE THE ISSUANCE OF THE INJUNCTION AT ISSUE IN THIS CASE	29
A. State Courts Have An Overriding Interest In Determining The Scope Of Their Own *Forum Non Conveniens* Doctrine	30
B. Federal Law Does Not Preempt State *Forum Non Conveniens* Law In Admiralty Cases	34
CONCLUSION	38

TABLE OF AUTHORITIES

Cases	Page
Aloha Airlines v. Director of Taxation, 464 U.S. 7 (1983)	33
Alleman v. Bunge Corp., 756 F.2d 344 (5th Cir. 1984)	37
Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981)	37
Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267 (9th Cir. 1982)	14
Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955)	*passim*
Asahi Metal Industry v. Superior Court of California, 107 S.Ct. 1026 (1987)	38
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	*passim*
Black Diamond S.S. Corp. v. Robert Stewart & Sons (The Norwalk Victory), 336 U.S. 386 (1949) (Frankfurter, J.)	35
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 349 U.S. 369 (1969)	*passim*
Castner v. First Nat'l Bank, 278 F.2d 376 (9th Cir. 1960)	22
Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311 (1981)	33
Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983)	1, 4
Chick Kam Choo v. Exxon Corp., 764 F.2d 1148 (5th Cir. 1985)	1, 5
City of Burbank v. Lockheed Terminal, Inc., 411 U.S. 624 (1973)	33
Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314 (11th Cir. 1983)	14
Couch v. Chevron Int'l Co., 682 S.W.2d 534 (Tex. 1984)	32
Dietzsch v. Huidekoper, 103 U.S. (13 Otto) 494 (1881)	25
Domingo v. States Marine Lines, 340 F. Supp. 811 (S.D.N.Y. 1972)	27
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	33

TABLE OF AUTHORITIES—Continued

	Page
Federal Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634 (1st Cir. 1979)	14
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	33
Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)	35
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	11, 20, 31
Gunter v. Atlantic Coast Line R. R. Co., 200 U.S. 273 (1906)	24
Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984)	38
Hill v. Martin, 296 U.S. 393 (1935)	15
Hines v. Davidowitz, 312 U.S. 52 (1941)	33
H.J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 342 U.S. 905 (1952)	15
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	30
In re Abraham, 421 F.2d 226 (5th Cir. 1970)	14
In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc)	21, 35
In re Federal Shopping Way, Inc., 717 F.2d 1264 (9th Cir. 1983)	14
In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) *cert. denied*, 459 U.S. 988 (1982)	14
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	38
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	33
Koster v. Lumbermen's Mut. Casualty Co., 330 U.S. 518 (1947)	20, 31
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)	34
Madruga v. Superior Court, 346 U.S. 556 (1954)	36
Milliken v. Meyer, 311 U.S. 457 (1940)	38
Missouri ex rel Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950)	11, 20, 31, 32
Mitchum v. Foster, 407 U.S. 225 (1972)	23, 29, 30
Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp., 660 F.2d 712 (8th Cir. 1981)	6, 22

TABLE OF AUTHORITIES—Continued

	Page
Oceanic Steam Navigation Co. v. Mellor (The Titanic), 233 U.S. 718 (1914)	35
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485 (1986)	11, 34, 36
Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1940)	13, 15, 30
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983)	33
Parsons v. Chesapeake & O. Ry. Co., 375 U.S. 71 (1963)	21, 31
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986)	23, 25
Pennzoil v. Texaco, 107 S.Ct. 1519 (1987)	*passim*
Perez v. Campbell, 402 U.S. 637 (1971)	33
Petition of the Texas Co. (The Washington), 213 F.2d 479 (2d Cir.), *cert. denied*, 348 U.S. 829 (1954)	37
Piper Aircraft Corp. v. Reyno, 454 U.S. 235 (1981)	11, 20, 31
Prak v. Weissinger, 276 F.2d 446 (4th Cir. 1960)	27
Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924)	36
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	33
Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co., 198 U.S. 188 (1905)	25
Root v. Woolworth, 150 U.S. 401 (1893)	25
Roth v. Bank of Commonwealth, 583 F.2d 527 (6th Cir. 1978), *cert. granted*, 440 U.S. 944, *cert. dismissed*, 442 U.S. 925 (1979)	14
Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985)	21, 31
Southern California Petroleum Corp. v. Harper, 273 F.2d 715 (5th Cir. 1960)	15
Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)	24

TABLE OF AUTHORITIES—Continued

	Page
T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983)	36-37
Toucey v. N.Y. Life Ins. Co., 314 U.S. 118 (1941)	*passim*
United States v. United Mine Workers, 330 U.S. 258 (1947)	31
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977)	*passim*
Younger v. Harris, 401 U.S. 37 (1971)	34
Zipfel v. Halliburton Co., 832 F.2d 1477 (9th Cir. 1987, *pet'n for cert. filed sub nom. Crowley Maritime Corp. v. Zipfel*, No. 87-1122 (Jan. 4, 1988)	*passim*

Regulations and Statutes

Act of March 2, 1793, c. 22 § 5, 1 Stat. 335	12
Act of March 3, 1911, c. 231, 265, 36 Stat. 1162	12
Section 71.031 Tex. Civ. Prac. & Rem. Code (Vernon 1986)	7, 32, 36, 37
28 U.S.C. § 1254(1)	2
29 U.S.C. §§ 101 *et seq.*	17, 18
45 U.S.C. §§ 151 *et seq.*	17
46 U.S.C. §§ 181-89	37
46 U.S.C. § 688	3
46 U.S.C. §§ 761 *et seq.*	3, 36

Miscellaneous Sources

Gilmore & Black, *The Law of Admiralty*, §§ 10-43–10-45 (2d ed. 1975)	35
H.R. Rep. No. 308, 80th Cong., 1st Sess., App. at 181-182 (1947)	24
1A J. Moore, W. Jaggart & J. Wicker, *Moore's Federal Practice* ¶ 0.317[7] (2d ed. 1987)	35
15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3828 (2d ed. 1986)	35
17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4225 (1978)	14, 15
18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4436 (1981)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-505

CHICK KAM CHOO, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 817 F.2d 307 and is reprinted in the Appendix to the petition for certiorari (hereafter "Pet. App.") at Pet. App. II at 1-86. The order of the United States District Court for the Southern District of Texas is not published. That order is set forth at Pet. App. I at 1-4. Reported decisions of the court of appeals relating to prior aspects of this litigation are as follows: *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1987. A Petition for Rehearing and a Suggestion for Rehearing En Banc were denied on June 24, 1987. The petition for a writ of certiorari was granted by the Court on November 16, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Anti-Injunction Act, 28 U.S.C. § 2283, which provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

Petitioner Chick Kam Choo is a resident of the Republic of Singapore and the widow of Leong Chong,[1] a shipwright killed in 1977 as a result of an accident that occurred while he was assisting in the repair of the Esso Wilhelmshaven, a blue-water vessel docked in Singapore. The ship was owned by Respondent Esso Tankers, Inc. ("ETI"), a 100% indirectly-owned affiliate of Respondent Exxon Corporation. It was being operated by Exxon International Company ("EIC"), an unincorporated division of Exxon Corporation, pursuant to a maritime service agreement between ETI and EIC. ETI has its headquarters and base of operations in New Jersey. Respondent Exxon, a New Jersey corporation, maintains headquarters and conducts business activities in Houston, Texas. *See* Joint Appendix ("JA") at 15-16; JA 27-28.[2] Plaintiff contended that the Liberian flag of the Esso Wilhelmshaven was a flag of convenience and that the vessel's true, beneficial flag was that of the United States.

[1] In addition to Petitioner Choo, the Petitioners in this Court include Benton Musselwhite, Esquire and Joseph C. Blanks, Esquire, both of whom are counsel for Petitioner Choo and both of whom were personally enjoined in the order at issue.

In 1978, Mrs. Choo brought suit in the United States District Court for the Southern District of Texas in Houston, presenting claims under the Jones Act, 46 U.S.C. § 688; the Death On The High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"); general maritime law of the United States; and the Texas Wrongful Death Statute. In this initial federal court action, Mrs. Choo neither cited nor relied on the Texas "open forum" statute, which was then embodied in Article 4678 of the Revised Civil Statutes of Texas. Tex. Rev. Civ. Stat. Ann., art. 4678 (Vernon Supp. 1984).

Respondents moved for partial summary judgment on the Jones Act, DOHSA and general maritime claims, maintaining that Chong was not a seaman, that the DOHSA was not applicable because the accident occurred within the territorial waters of a foreign nation, and that the general maritime law did not apply because of insufficient contacts with the United States. Respondents also sought dismissal of Mrs. Choo's claims on grounds of *forum non conveniens*. *See* JA at 8-12.[3] In that re-

[2] The recommendations of the United States magistrate, which the district court adopted as the basis for its *forum non conveniens* dismissal, found that Exxon had its "headquarters" and "principal place of business" in Houston, Texas. *See* JA at 32. Exxon subsequently maintained in the removal proceeding that its principal place of business was in New York rather than Houston, however. *See* JA at 47. As in personam jurisdiction was admitted by Exxon, this difference is of no consequence to the issues presented here.

[3] As the magistrate indicated, Petitioner Choo's case was consolidated with the separate actions of two other parties whose decedents were killed in an accident on the same vessel, which had occurred eleven days prior to the accident that resulted in the death of Mr. Chong. *See* JA at 27-28. Those cases are not at issue here.

gard, Respondents asserted only that the federal court should not hear the remaining claims. They never argued, and the district court never decided, whether federal maritime law preempted other courts, including those of Texas, from deciding *forum non conveniens* questions in accordance with their own standards. Likewise not presented or decided by the district court was the question whether the case could be dismissed under Texas *forum non conveniens* principles. *See* JA at 14-26; *see also* note 11, *infra*.

The district court, adopting the recommendations of the magistrate, held that Chong was not a Jones Act seaman and that the DOHSA was inapplicable because the accident occurred within the territorial waters of Singapore. The court also granted Respondents' motion for dismissal of Petitioner Choo's general maritime claims. JA at 34-36. The court also ordered a dismissal, without prejudice, on grounds of *forum non conveniens*, with the proviso that Respondents consent to the jurisdiction of the appropriate Singapore court, submit to service of process there, waive any possible statute of limitations defenses, and consent to satisfy any judgment rendered by that court. JA at 34-35. These rulings were affirmed on appeal. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983) (*"Choo I"*).

Thereafter, Mrs. Choo filed suit in the Texas state courts in Houston.[4] *See* JA at 37-44. Respondents im-

[4] Although the Fifth Circuit characterized the complaints in the state and federal cases as "identical," *see* Pet. App. II at 3, n.2, comparison of Mrs. Choo's complaints in *Choo I* and the state case indicates that the court was mistaken in that regard. *Compare* JA at 3-5 *with* JA at 37-43. The charging paragraph of the federal complaint recites causes of action under the Jones Act and general maritime law, and, in the alternative, claims a right of recovery under DOHSA and the Texas Wrongful Death Statute. *See* JA at 4, ¶ 4. While the state case initially included all of those claims, Mrs. Choo also pleaded an alternative right to recovery under the substantive laws of Singapore, which she alleged were similar to the laws of Texas with respect to liability and damages issues. *See*

mediately removed to the federal district court on alleged diversity grounds, and the case was assigned to a different district judge.[5] After denying Mrs. Choo's motion to remand to the state courts, the district court dismissed the action on grounds of *res judicata* and sanctioned her counsel. JA at 86-87. The Fifth Circuit reversed, holding that complete diversity among the parties did not exist, and thus the removal was not authorized. The sanctions were dissolved, and the case was returned to the state court for further proceedings. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985) (*"Choo II"*).

Soon after the Fifth Circuit's mandate issued in *Choo II*, Respondents instituted an independent injunction action against Petitioner Choo and her counsel in the federal district court, seeking to enjoin the state action as an interference with the prior federal judgment. JA at 90-94. This new action was assigned to the same district court judge that had dismissed the removed case. Petitioners opposed, asserting lack of jurisdiction, the Anti-Injunction Act, 28 U.S.C. § 2283, and principles of equity. JA at 96-98.

Respondents' request for injunctive relief was predicated only on the alleged *res judicata* effect of the initial

JA at 40, ¶ IV. Furthermore, reciting jurisdiction under 46 U.S.C. § 764, plaintiff alleged that she intended to demonstrate that she had causes of action under the laws of all foreign countries that were connected to the incident in question. *See* JA at 40, ¶ VI.

As the court of appeals correctly noted, Mrs. Choo accepted a dismissal of her Jones Act, DOHSA and general maritime claims that were initially brought in the state action. Pet. App. II at 3, n.2. The result did not limit the case to state-law claims, however, since the foreign claims had been explicitly pleaded.

[5] The initial suit was considered by the Honorable Gabrielle K. McDonald. The removed case, as well as the injunction action giving rise to this petition, were both assigned to the Honorable Norman W. Black.

federal action on the state case. Respondents did not contend, nor did the second district court decide, that the district court in *Choo I* had determined that there was an identity of objective facts and criteria governing the application of federal *forum non conveniens* law and the law of Texas. Nor did Respondents urge that the first district court had decided that a *forum non conveniens* dismissal would have been appropriate under Texas law, or that Texas law was preempted with respect to the *forum non conveniens* issue. *See* JA at 90-94. These considerations likewise were not addressed by the second district court. JA at 118-119. That court nonetheless granted the requested injunction and again sanctioned counsel. *Id.* With only the most passing reference to the Anti-Injunction Act, a panel of the Fifth Circuit affirmed.[6]

After determining that the district court retained pendent jurisdiction to enter a *forum non conveniens* dismissal of the nonfederal claims, Judge Gee's opinion turned to an examination of general principles of *res judicata*, estoppel, and *forum non conveniens*. Acknowledging that federal courts permit relitigation of *forum non conveniens* determinations in cases where the plaintiff demonstrates different contacts between the new forum and the underlying dispute, Pet. App. II at 14-15 (citing *Mizokami Bros. of Arizona v. Mobay Chemical Corp.*, 660 F.2d 712 (8th Cir. 1981)), and that Professor Wright had commented that *forum non conveniens*

[6] Each of the three judges on the panel wrote separately to express his own views concerning the proper resolution of the appeal. As the opening footnote in the majority opinion makes clear, Chief Judge Clark would have perferred to resolve the case without deciding the *res judicata* effect to be accorded the federal court's *forum non conveniens* dismissal, and he joined Judge Gee's opinion only because his view of that issue could not command a majority. *See* 817 F.2d at 309, n.*; *see also* Pet. App. II at 80-84 (Clark, C.J., concurring). Judge Reavley dissented, stating that the matter should be left for resolution by the state courts. *Id.* at 84-86 (Reavley, J., dissenting).

rulings generally do not result in issue preclusion because of intrinsic differences in convenience issues, Pet. App. II at 18 (citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4436, at 346 (1981)), Judge Gee professed to distinguish those principles. He concluded that, under the present circumstances, direct estoppel should apply, Pet. App. II at 19-22, and that Mrs. Choo had failed to present objective facts that would materially alter the previous *forum non conveniens* ruling. *Id.* at 15-16, 21-22, 24-26.

Although stating that this determination normally would have disposed of the case, Judge Gee then turned to an asserted "peculiarity" of Texas law that, in his view, made it necessary "to consider larger matters indeed." *Id.* at 26. Examining the Texas "open forum" statute that Mrs. Choo sought to invoke in the Texas courts, Judge Gee expressed concern that the Texas courts might agree with Petitioners that this statute reflected the legislature's intent to render Texas the "world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else." *Id.* at 28-29.[7] While recognizing the issue to be an "open"

[7] As this Court observed in *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 (1987), Article I, Section 13 of the Texas Constitution contains an "open courts" provision that requires that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." The Texas statute considered by the Fifth Circuit, Section 71.031 of Tex. Civ. Prac. & Rem. Code (Vernon 1986), reflects that mandate and provides as follows:

> (a) An Action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

question" under Texas law, *id.* at 29-33, the court concluded that there was a "substantial likelihood that [the Texas Supreme Court] will decline to acknowledge the doctrine of *forum non conveniens* even in a maritime case governed by federal law." *Id.* at 34. Judge Gee then held that federal *forum non conveniens* determinations should preempt state law in such cases. On this basis, he sustained the district court's injunction, thereby depriving the Texas courts of the opportunity to address the "open question" concerning interpretation of the Texas statute at issue.

Chief Judge Clark's separate concurring opinion joined the result reached by Judge Gee, but expressed a different rationale. Chief Judge Clark concluded that the federal district court's determination that the contested issues should not be litigated in Houston was final and binding as between the parties, and he stated that the challenged injunction "did no more than order *parties* that had been subject to its jurisdiction to give effect to its adjudication of an issue raised by and finally decided as between them." *Id.* at 81-82 (Clark, C.J., concurring) (emphasis in original). Recognizing that injunctions addressed to parties can have an impact on courts as well, and that some such injunctions are prohibited by the Anti-Injunction Act, Chief Judge Clark maintained that this injunction was authorized by the exception to the Act allowing injunctions to effectuate prior federal judgments. He further asserted that the injunction "does not

---

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

implicate Texas courts or Texas law." *Id.* at 82. According to Chief Judge Clark, Petitioners' actions were contrary to the federal court's final order. He thus concluded that "[t]he fact that Texas courts might not use the same principles of adjudication furnishes only the condition that permits the violation to occur," since Texas law "may permit, but it surely does not require, that Choo use its courts." *Id.* at 83.

Judge Reavley dissented, maintaining that "[i]t is for the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination." *Id.* at 84 (Reavley, J., dissenting). As he continued,

> The majority are prepared to announce a bold new rule of preemption and to nullify the Texas open forum law for admiralty cases. If that be good law, this is not the time or place to declare it. I would prefer that the Texas courts decide Texas law, and that another court, preferably the Supreme Court, after full consideration, decide whether to sweep so far.

Id. at 85.

After a conflicting decision was rendered by the United States Court of Appeals for the Ninth Circuit, *see Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *pet'n for cert. filed sub nom. Crowley Maritime Corp v. Zipfel*, No. 87-1122 (January 4, 1988), this Court granted certiorari.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the federal court had jurisdiction to entertain Respondents' request for injunctive relief in the wake of its previous *forum non conveniens* determination. The Anti-Injunction Act precludes lower federal courts from enjoining the proceedings of state courts except in three limited circumstances. The only exception even potentially applicable here is the so-called relitigation exception. That

provision does not apply for two separate reasons, however.

First, the issues that prompted the injunction had not been resolved in the initial federal district court action. That court did not decide whether Texas *forum non conveniens* law was preempted in maritime cases. Nor did it determine whether Texas law would require a *forum non conveniens* dismissal in this case. Rather, it applied federal *forum non conveniens* principles to rule that this case did not belong in the federal court in Houston. In these circumstances, the relitigation exception to the Anti-Injunction Act is inapplicable. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Second, even assuming that the *forum non conveniens* issue was resolved in the initial federal court action, the Anti-Injunction Act would still prohibit the injunction issued in this case. The relitigation exception applies only to cases that have been resolved on their merits. A discretionary dismissal for *forum non conveniens* is simply not the kind of ruling that a federal court may later protect by enjoining a state court. *See Zipfel v. Halliburton Co., supra.* Having decided that it will not hear the matter, the federal court has no remaining interest in prohibiting the court of a sovereign state from deciding that issue for itself.

The court of appeals' contrary analysis does not withstand scrutiny. Its holding that federal *forum non conveniens* law preempts state law in maritime cases does not support the injunction below. It is well-established that federal preemption does not create an exception under the Anti-Injunction Act. *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955). The state courts have long been recognized as fully capable of deciding federal preemption issues. The decisions of those courts on such issues, moreover, always remain subject to review by this Court.

2. Even if jurisdiction existed to entertain a request to enjoin this state court proceeding, principles of equity, comity, and federalism precluded the issuance of an injunction in this instance. As a general rule, the state courts are equally competent to determine what effect, if any, to give a federal court's previous *forum non conveniens* determination, and comity and federalism require that they be allowed to do so in all but the most unusual of circumstances. *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950). In this case, the mandate for allowing the state court to consider the issue is especially compelling. As the court of appeals acknowledged, the Texas Supreme Court has not finally determined the reach of the Texas "open forum" statute, or the extent to which *forum non conveniens* considerations apply thereunder. Certainly, the Texas courts are best able to interpret the scope of a Texas statute. They are also as adept as the lower federal courts in identifying and accommodating any unique considerations of maritime law that might warrant special recognition.

The court of appeals took these issues away from the Texas courts on the ground that they were preempted under federal law. While we think that those preemption issues are better left to the Texas courts in the first instance, we note that the Fifth Circuit's analysis of the matter is flawed in any event. Congress has long preserved state court jurisdiction to hear admiralty claims. 28 U.S.C. § 1332; *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). In so doing, it has recognized that state courts are entitled to apply their own procedural rules to federal substantive law. The doctrine of *forum non conveniens* is procedural for these purposes. It does not affect substantive behavior, and it goes to the heart of a court's operations and administrative concerns. *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The foreign policy concerns referred to by the Fifth Circuit are bet-

ter left for Congress to assess. Likewise, the court's concerns about Texas opening the floodgates to foreign litigants are overstated. That is, in any case, a matter for Texas to decide.

ARGUMENT

I. THE ANTI-INJUNCTION ACT ESTABLISHES A JURISDICTIONAL BAR TO FEDERAL INJUNCTIONS OF STATE COURT PROCEEDINGS IN ALL BUT THREE NARROWLY-DEFINED CIRCUMSTANCES, NONE OF WHICH ARE APPLICABLE HERE.

The Anti-Injunction Act recognizes the important allocation of powers between the lower federal courts and the state court systems that has prevailed since the founding of the Republic. Reflecting "the essentially federal nature of our national government," *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, *supra* 398 U.S. at 285, the Act precludes federal injunctions of state court proceedings in all but three narrowly defined circumstances.

The Act and its predecessors uniformly have reflected Congress's judgment that the lower federal courts are to accord a full measure of respect for the autonomy and independence of the state courts.[8] As this Court stated

[8] The present Anti-Injunction Act, 28 U.S.C. § 2283, is the third such statute enacted by Congress. The original was enacted in 1793 as one of a number of amendments to the statutes establishing the judicial courts of the United States and stated, "nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, c. 22, § 5, 1 Stat. 335. This provision was supplemented in the Judicial Code of 1911 to add a bankruptcy exception. The 1911 revision provided as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Act of March 3, 1911, c. 231, § 265, 36 Stat. 1162. The present version of the Anti-Injunction Act, enacted in 1948, was passed by Congress in response to this Court's decision in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941).

in explaining the purpose of the original limitation against federal injunctions of state court proceedings, "[t]he provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941). Likewise, the present Act, embodying the "fundamental principle of a dual system of courts," *Atlantic Coast Line*, *supra*, 398 U.S. at 286, serves to forestall "the inevitable friction between the state and federal courts that ensues from injunctions of state judicial proceedings by a federal court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion); *see also Amalgamated Clothing Workers of America v. Richman Bros.*, *supra*, 348 U.S. at 519; *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 8-9 (1940).

Consistent with this basic purpose, the Act allows only three limited exceptions in which federal courts may enjoin state proceedings: when expressly authorized by an Act of Congress, necessary in aid of federal jurisdiction, or necessary to protect or effecutate federal court judgments. Even these limited exceptions are to be read strictly and narrowly. As the Court has made clear, exceptions to the Anti-Injunction Act are "not to be enlarged by loose statutory construction," *Atlantic Coast Line*, *supra*, 398 U.S. at 287; nor are the prohibitions of the Act "to be whittled away by judicial improvisation." *Amalgamated Clothing Workers*, *supra*, 348 U.S. at 514.

The only superficially plausible statutory exception that might justify the injunction issued below is the so-called relitigation exception, which authorizes injunctions when necessary to "protect or effectuate" federal court

judgments.[9] That provision, however, is inapposite here. The district court in the initial case never was asked to

[9] The other exceptions plainly do not apply. No serious contention could be made that the injunction in question is expressly authorized by an Act of Congress, as the first exception to the Anti-Injunction Act requires. The *forum non conveniens* determination that the Fifth Circuit sought to protect is a common law doctrine rather than a statutory one, and there is no Act of Congress that expressly authorizes the issuance of the injunction in question. *See generally Vendo Co., supra.*

Nor can the injunction be justified as necessary in aid of the court's jurisdiction. As the plurality made clear in *Vendo*, this exception applies only "where the federal court has obtained jurisdiction over the res, prior to the state court action." 433 U.S. at 641. *See also* 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4225, at 333-39 (1978). The Court has "never viewed parallel in personam actions as interfering with the jurisdiction of either court . . . ." *Vendo Co., supra*, 433 U.S. at 642. *See also Atlantic Coast Line, supra*, 398 U.S. at 295-96; *In re Abraham*, 421 F.2d 226 (5th Cir. 1970); *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982); *In re Federal Shopping Way, Inc.*, 717 F.2d 1264 (9th Cir. 1983); *Roth v. Bank of Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. granted*, 440 U.S. 944, *cert. dismissed*, 442 U.S. 925 (1979); *Coastal Petroleum Co. v. U.S. Agri-Chemicals*, 695 F.2d 1314 (11th Cir. 1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); 17 C. Wright, A. Miller & E. Cooper, *supra*, § 4225, at 336 (explaining that it is "immaterial that the state action involves a question of federal law").

Finally, as the Ninth Circuit's analysis of the issue in *Zipfel* recognizes, district court's *forum non conveniens* dismissal of an action eliminated any jurisdiction to be protected:

> This exception does not apply . . . to the foreign seaman's lawsuits because the district court no longer has jurisdiction over those suits. The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seaman's cases. At that point there was no need for an injunction to protect the district court's jurisdiction.

Zipfel v. Halliburton Co., 832 F.2d 1477, 1488 (9th Cir. 1987) (citations omitted), *petn. for cert. filed sub nom. Crowley Maritime Corp. v. Zipfel*, No. 87-1122 (January 4, 1988). *See also, Amalgamated Clothing Workers, supra*, 348 U.S. at 519; *Federal Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979); *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 720 (5th Cir. 1960); *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951), *cert. denied*, 342 U.S. 905 (1952).

decide and never decided either that the Texas courts would decline to entertain Mrs. Choo's action or that federal preemption would prohibit them from doing so. Moreover, even had the district court initially decided that the Texas courts would be prohibited from entertaining this case on *forum non conveniens* grounds, that kind of determination is simply not the kind of federal court ruling on the merits that may be protected by an injunction.

Apparently cognizant of these basic principles, the Fifth Circuit attempted to support the injunction below by asserting that federal *forum non conveniens* law preempts state law in admiralty cases. But even if its preemption argument were correct, the Fifth Circuit's conclusion would not follow. On the contrary, the proper forum in which to have that issue resolved is the Texas courts, subject to ultimate review by this Court.[10]

A. The District Court In the Initial Action Never Even Considered, Let Alone Decided, Whether The Texas Courts Would Have Or Could Have Entertained This Case.

The relitigation exception to the Anti-Injunction Act reflects Congress's determination that when a federal

[10] Chief Judge Clark's concurrence seems to turn in substantial measure on his view that an injunction against parties is different from an injunction against a state court. *See* Pet. App. II at 80-84 (Clark, C. J., concurring). Clearly that is in error. Even though the injunction was issued against Petitioner Choo and her counsel, this Court has repeatedly recognized that an injunction prohibiting litigants from pursuing claims in the state courts is considered to be an injunction against a state court proceeding for purposes of the Anti-Injunction Act. *See Atlantic Coast Line, supra*, 398 U.S. at 287. *See also Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940); *Hill v. Martin*, 296 U.S. 393 (1935); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4225, at 717 (1978).

court has disposed of a case or controversy on the merits it may thereafter protect its judgment by precluding relitigation of the same matter in state court. *See, e.g., Atlantic Coast Line, supra.* On the facts presented here, the necessary prerequisites to the invocation of this exception do not exist. In the initial district court action, the court granted summary judgment on Mrs. Choo's claims under the Jones Act, DOHSA and general maritime law, concluding that these legal theories were inapplicable on the facts alleged. The Texas "open forum" statute was not asserted in the complaint, however, *see* JA at 3-7, nor was it raised by Mrs. Choo in opposition to Respondents' motion to dismiss on grounds of *forum non conveniens.* Respondents' arguments in support of *forum non conveniens* likewise addressed the federal case law, not the laws of the State of Texas.[11] Thus, the court's dismissal on *forum non conveniens* grounds, holds only that, under *federal* law, this case belongs in Singapore rather than the federal district court in Houston.

The court of appeals in this case nevertheless concluded that an injunction was necessary to prevent the Texas courts from deciding whether to entertain Mrs. Choo's action. In other words, the Fifth Circuit precluded the Texas courts from considering state law *forum non conveniens* issues, as well as possible federal preemption issues, even though none of these matters were raised or decided in the district court. This decision cannot be squared with the principles governing the relitigation exception to the Anti-Injunction Act.

This Court's ruling in *Atlantic Coast Line* establishes that federal injunctions cannot issue against state court

[11] Examination of Respondents' motion for partial summary judgment and dismissal on grounds of *forum non conveniens* confirms that Respondents made no reference to the Texas "open forum" statute. *See* JA at 8-12. Similarly, with the exception of a single citation to a New York state case, Respondents' discussion of the *forum non conveniens* issue in their brief in support of the motion cited only federal authorities. *See* JA at 14-26.

proceedings to protect judgments that might have been rendered in the federal case but were not. In that case, the district court had issued an injunction preventing the petitioner, a railroad company, from enforcing a state court injunction against the respondent union's picketing activities, which the district court apparently considered to be protected activities in accordance with this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Concluding that the district court's judgment, which was assertedly protected by the federal injunction, had not decided whether the railroad would have been precluded from obtaining an injunction under state, rather than federal, law, this Court reversed.

The railroad company in *Atlantic Coast Line* had initially sought injunctive relief in the federal district court in 1967, which was denied when the district court decided that federal law did not prohibit picketing because the union had a right to engage in that activity under the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* *See Atlantic Coast Line, supra*, 398 U.S. at 288-90. Immediately thereafter, the company sought and obtained an injunction against the picketing in the Florida courts. Two years later, the Court in *Jacksonville Terminal* reversed a state court injunction prohibiting picketing by unions at a location immediately next to the location at issue in *Atlantic Coast Line*, holding that the picketing activities were protected under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Following the *Jacksonville Terminal* decision, the railroad company in *Atlantic Coast Line* sought to obtain dissolution of the state court injunction in the Florida court. It failed in that effort, however, as the Florida court determined that the *Jacksonville Terminal* decision was not controlling.[12] Thereafter, the company

[12] It should be noted that this Court assumed for the purpose of its decision in *Atlantic Coast Line* that the Florida court had erred in its determination that the *Jacksonville Terminal* case was not controlling. *See Atlantic Coast Line, supra*, 398 U.S. at 291, n.5.

sought and obtained an injunction from the federal district court, prohibiting enforcement of the earlier state court injunction.

This Court reversed, holding that the federal injunction could not be justified as necessary to protect or effectuate the district court's 1967 order. Central to the Court's decision was its careful analysis of what was and was not decided in the initial district court judgment that assertedly was protected by the later injunction. Examining the pleadings, the parties' arguments to the district court, and the court's order, this Court determined that the sole issue presented and decided in the initial federal court proceeding was whether the picketing activity was protected by the Norris-LaGuardia Act. *Atlantic Coast Line, supra*, 398 U.S. at 288-89. As the Court explained,

> Based solely on the state of the record when the order was entered, we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. . . . [W]e feel that the District Court in 1967 determined that federal law could not be invoked to enjoin the picketing at Moncrief Yard, and that the union did have a right "to engage in self help" as far as the federal courts were concerned. But that decision is entirely different from a decision that the Railway Labor Act precludes state regulation of the picketing as well, and this latter decision is an essential prerequisite for upholding the 1969 injunction as necessary "to protect or effectuate" the 1967 order.

Id. at 290.

The decision in *Atlantic Coast Line* demonstrates that the initial federal court judgment must have clearly resolved the precise point assertedly protected by the subsequent injunction before the relitigation exception can be held to apply. The majority noted, for example, that the record on that issue was "not unambiguously

clear." *Id.* at 288. Indeed, the record contained evidence that was pointed to by the union suggesting that the district court's initial judgment had encompassed a determination that the picketing activities were protected against state as well as federal injunction. *See id.* at 289-90. Justices Brennan and White, in dissent, were persuaded that the district court's initial ruling necessarily implied a determination that the union's right to picket could not be subverted by resort to state court proceedings. *Id.* at 297, 299 (Brennan, J., dissenting).[13] These considerations were not deemed sufficient by a majority of the Court, however. *Atlantic Coast Line, supra*, 398 U.S. at 293.

In the instant case, it is simply not possible to suggest that the initial federal decision resolved the issues that were subject to the later injunction. To begin with, Texas law on *forum non conveniens* was never decided by the federal court. Thus, that issue should have been left for consideration in the state court action. Nor does such a conclusion exalt form over substance. It is important to emphasize in this regard that a federal and state court in the same city obviously can reach very different *forum non conveniens* rulings. As this Court

---

[13] Justices Brennan and White did not disagree with the majority's recitation of the history and policies underlying Section 2283 or with its determination that *Amalgamated Clothing Workers, supra*, establishes that federal courts do not have the authority to enjoin state court proceedings "merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law or federal procedures." *Atlantic Coast Line, supra*, 398 U.S. at 297-98 (Brennan, J., dissenting). Indeed, as previously noted, the majority opinion assumed for the purpose of deciding the case that the Florida court had erred in determining that a state injunction could issue, notwithstanding the Court's *Jacksonville Terminal* decision. *See id.* at 291, n.5. Thus, it is fair to say that the majority in *Atlantic Coast Line* assumed that the state court had in fact improperly asserted jurisdiction in an area preempted by federal law and nonetheless disallowed a federal injunction. *See also* Part IC, *infra*.

has explained, *forum non conveniens* determinations generally involve consideration of factors relating to "private interest" concerns and "public interest" concerns. *See generally, Piper Aircraft Corp. v. Reyno*, 454 U.S. 235, 241 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermen's Mut. Casualty Co.*, 330 U.S. 518 (1947). The "private interest" concerns typically involve considerations relating to the interests of the individual litigants, such as the relative access to sources of proof, the availability of process for compulsion of witnesses, and other factors that contribute to the ease and expense of a particular trial. The "public interest" concerns, by contrast, relate to more generalized institutional interests of the forum itself, such as administrative difficulties flowing from docket congestion, the interests of a forum in resolving controversies of the kind presented, and the possible unfairness of burdening the citizens of that forum with jury duty to decide the case. *See generally Piper Aircraft, supra*, 454 U.S. at 241, n.6. Obviously, courts can differ in their assessment of these factors.

The Fifth Circuit's conclusion that the *forum non conveniens* determination of a federal court in a maritime case necessarily precluded the maintenance of an action in the Texas courts,[14] in short, reflects a failure to recognize the distinction between the "public" and "private interest" factors that inhere in federal *forum non conveniens* rulings and the possibility that the Texas courts may choose to balance those factors differently than would a federal court. This Court has held that state courts generally are free to decide *forum non conveniens* issues in accordance with their own standards, which may differ from those applied in the federal courts. *See Missouri v. Mayfield, supra.* In other words, absent a determination that the Texas courts would apply the same standards as did the federal court, the federal *forum non conveniens* determination cannct possibly preclude a different result in the state courts. *See also Parsons v. Chesapeake & O. Ry. Co.*, 375 U.S. 71 (1963), discussed at note 22, *infra.*[15]

In the instant case, the court of appeals never decided that the same standards would be applied in interpreting the Texas "open forum" statute as applied in federal courts. On the contrary, Judge Gee frankly acknowledged that he approved of the injunction in part because it would deprive the Texas courts of the opportunity to apply different criteria, Pet. App. II at 25-80, and Chief Judge Clark recognized the distinct possibility that the Texas courts would apply different criteria in assessing the *forum non conveniens* issue. *Id.* at 82-83 (Clark, C.J., concurring). Accordingly, Judge Gee's assertion that Mrs. Choo was required to demonstrate "objective facts" distinguishing the federal court's *forum non conveniens* ruling, *id.*, at 25, was misguided. As he himself recognized, even the same facts might lead to a different determination when weighed under the very different legal standards that the Texas courts would apply under the Texas "open forum" statute.[16]

---

[14] The obvious focus of the injunction was to prevent Petitioner Choo's litigation in the Texas courts, and that likewise was the focus of the appeal. It should be noted, however, that the injunction actually prevents Petitioners from proceeding in *any* state court in the United States. *See* Pet. App. I at 1-4.

[15] In fact, a number of state courts are more liberal in offering their forum to litigants than are some federal courts. *See, e.g., In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1155 (5th Cir. 1987) (en banc) (describing Louisiana law); *Sibeja v. Dow Chemical Co.*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) (Florida law).

[16] For the same reason, Judge Gee's analysis and distinction of some of the federal authorities misses the point. It should be noted, moreover, that federal *forum non conveniens* dismissals are often not deemed preclusive even in other *federal* courts. Federal courts have permitted relitigation of *forum non conveniens* issues from one federal court to the next in cases where the plaintiff demon-

Apparently aware of these flaws of analysis, the Fifth Circuit attempted to bootstrap its ruling by further holding that federal law preempts state law on the *forum non conveniens* issue in an admiralty case. The argument is unavailing. Even assuming, contrary to what we show below, *see* Part II B, *infra*, that the Fifth Circuit's preemption ruling was correct, the issue was nevertheless not considered or decided in the original federal action. Therefore, it is not within the relitigation exception. *See Atlantic Coast Line*, *supra*. Nor, as we also discuss below, is federal preemption an independent ground for enjoining a state court proceeding. *See* Part I C, *infra*.

In sum, the relitigation exception to the Anti-Injunction Act does not apply here for the simple reason that the grounds on which the injunction was premised were neither raised nor resolved in the initial federal action.

B. The Relitigation Exception Does Not Apply In Any Event Since It Only Authorizes Injunctions To Protect Final Judgments That Have Established The Substantive Rights Of The Parties Regarding The Merits Of The Case Or Controversy At Issue.

Even assuming that the federal court's *forum non conveniens* ruling could properly be said to have decided that this case could be litigated only in Sinapore, that ruling would still not fall within the relitigation exception. As we demonstrate below, not every issue decided during the course of a federal litigation can be sheltered from possible reconsideration by enjoining state court

---

strates different contacts between the new forum and the underlying dispute, as Judge Gee acknowledged. Pet. App. II at 14, *citing Mizokami Bros.*, *supra*. In fact, the Ninth Circuit has recognized that one federal district court judge can even reconsider a *forum non conveniens* determination of another judge of the same federal judicial district in appropriate cases. *See Zipfel*, *supra*, 832 F.2d at 1481, *citing Costner v. First Nat'l Bank*, 278 F.2d 376, 380 (9th Cir. 1960). *But see Pasteurka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977).

litigation. Rather, the Anti-Injunction Act allows such injunctions only where they are required to protect or effectuate definitive judgments on the merits, which establish the substantive rights of the parties. *Forum non conveniens* determinations are not the kinds of judgments that warrant the invocation of this narrow exception to the Act.

Although the relitigation exception was enacted for the first time in the 1948 revision to the statute, it had been recognized in a number of Supreme Court decisions that preceded the Court's opinion in *Toucey v. New York Life Ins. Co.*, *supra*. In fact, the specific provision authorizing injunctions "to protect or effectuate its judgments", 28 U.S.C. § 2283, was enacted by Congress in reaction to *Toucey* and was intended to overrule *Toucey*'s express disavowal of the relitigation exception that had evolved through prior judicial interpretation. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Mitchum v. Foster*, 407 U.S. 225, 236 (1972).

While the legislative history of the relitigation exception is sparse,[17] it nonetheless confirms that Congress

---

[17] The pertinent legislative history, contained solely in the Reviser's Note to the statute, is brief and therefore may be quoted in its entirety:

> Based on Title 28, U.S.C. 1940 ed., § 379 (Mar. 3, 1911, c. 231, § 265, 36 Stat. 1162).
>
> An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions. The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.
>
> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., 62

did not intend to authorize lower federal courts to issue injunctions against state court proceedings to "protect" such intermediate rulings as *forum non conveniens* determinations. Rather, the relitigation exception was enacted to confirm the ability of the lower federal courts "to enjoin relitigation of *cases and controversies fully adjudicated by such courts.*" H.R.Rep. No. 308, 80th Cong., 1st Sess., App. at 181-82 (1947) (emphasis added). As this statement indicates, Congress intended that the relitigation exception allow for federal injunctions where necessary to protect judgments reflecting the federal courts' final resolution of the substantive merits of the case or controversy at issue. There is, however, no support in the legislative history of Section 2283—or in the pre-*Toucey* decisions that established the principle that *Toucey* rejected and Congress sought to restore—for the proposition that interim determinations of the kind at issue here were to be protected by federal injunctions.

The cases examined by Mr. Justice Reed's dissenting opinion as the basis for the relitigation exception were cases in which the parties had litigated the merits of the controversy in the federal courts to a point of conclusive determination.[18] Only these kinds of judgments fit within

---

S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change.)

> Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucy [sic] decision.

H.R. Rep. No. 308, 80th Cong., 1st Sess., App. at 181-82 (1947).

[18] *See, e.g., Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1920) (injunction authorized to prevent relitigation of the substantive rights previously established in federal court litigation); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906) (injunction authorized to protect prior federal adjudication invalidating state tax as unconstitutional); *Riverdale Cotton Mills v. Alabama & G. Manufacturing Co.*, 188 U.S. 189 (1905) (injunction authorized to protect validity of title that had been established in previous federal proceeding); *Root v. Woolworth*, 150 U.S. 401 (1893) (adjudication of title and possession to property); *see also Toucey, supra*, 314 U.S. at 142, 152, n.18 (Reed, J., dissenting) and cases cited therein.

the rationale for the relitigation exception. As Justice Reed explained:

> The alternative [to allowing an injunction] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication . . . . [W]e find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field. . . . A decree forbidding a defeated party from setting up any right, anywhere, based upon claims adjudged is the usual form where injunctions are appropriate for determining controversies.

Toucey, supra, 314 U.S. at 144-45 (Reed, J., dissenting.[19] *See also Dietzsch v. Huidekoper*, 103 U.S. [13 Otto] 494, 498 (1881) (without an injunction "[t]he judgment in defendant's favor would settle nothing. Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere").

---

[19] As the Court indicated in *Parsons Steel, supra*, Congress's enactment of Section 2283 reflected its desire to overrule the majority opinion in *Toucey* in favor of the dissenting views expressed in that case by Mr. Justice Reed. Thus, the views of that dissenting opinion should be accorded deference in interpreting the intent of Congress in enacting the relitigation exception in the present Anti-Injunction Act.

A *forum non conveniens* ruling is not one that adjudicates the merits of the case or controversy to a point of final resolution. Rather, it is a determination that the litigants must proceed to another forum for that very purpose. To accord such determinations a level of importance that would authorize an injunctive decree against a state court would be to trivialize the important policies of the Anti-Injunction Act. As the Ninth Circuit has recognized:

> Defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuit in a United States district court. No judgment on the merits has been rendered.

Zipfel, supra, 832 F.2d at 1488.[20]

A *forum non conveniens* decision, in sum, means that the court in question has decided that it will not hear the case. Having relinquished its authority, that court should not enjoin other courts from deciding for themselves whether they will hear a case. In other words, even if a federal court thinks that a Singapore court is preferable to a Texas state court for hearing a case, the federal court's interest in the matter ends once it decides that it

[20] The Ninth Circuit in *Zipfel* attempted to distinguish its holding from the Fifth Circuit's ruling, maintaining that the original dismissal in the *Choo* case had granted the motion for summary judgment on all claims and had "permanently enjoined the plaintiff from prosecuting any action against the defendants in the courts of Texas or any other state." *Zipfel, supra*, 832 F.2d at 1488. Because of the wide scope it ascribed to the original disposition, the Ninth Circuit found that the injunction in this case was proper because Mrs. Choo "was simply bound by the earlier judgment which enjoined her from relitigating the case in state court." *Id.* at 1489. This purported distinction rests on a faulty premise. Summary judgment was granted only on three of Mrs. Choo's claims. Her state law claims were dismissed only on grounds of *forum non conveniens*. Moreover, the original disposition did not enjoin Mrs. Choo from any activity. The injunction was issued by a second federal judge in a separate action.

will not hear the case. At that point, an injunction against the court of a sovereign state is largely a gratuitous insult that does not protect any real federal court interest.[21]

C. The Injunction Cannot Be Justified As Necessary To Protect A Federal Concern That Would Preempt The State Courts From Reaching A Contrary Determination.

In Judge Gee's view, the injunction at issue also was necessary to protect the preemptive effect that a federal *forum non conveniens* determination assertedly should have in admiralty cases, and much of his lengthy opinion is devoted to attempting to establish that such a preemptive effect is required. Even assuming, contrary to what we show below, *see* Part II B, *infra*, that his analysis is correct, the short answer is that federal injunctions are not allowed for the purpose of preventing the state courts from deciding for themselves whether matters are preempted by federal law.

This precise issue arose in *Amalgamated Clothing Workers, supra*. In that case, an injunction was sought against a state court proceeding on the ground that the matter at issue involved labor activities that were protected by federal law. Noting that the three express exceptions of the Anti-Injunction Act were intened to

[21] This conclusion also flows from the standard established in *Atlantic Coast Line*, where the Court recognized that both the second and third exceptions to the Anti-Injunction Act focus on whether it is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair a federal court's flexibility and authority to decide the case." *Atlantic Coast Line, supra*, 398 U.S. at 295. Once a court has decided to decline jurisdiction under the doctrine of *forum non conveniens*, its "authority to decide the case" can no longer be impaired. *See also Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 817 (S.D.N.Y. 1972).

cover "all exceptions," 348 U.S. at 515, the Court concluded,

> In the face of this carefully considered enactment, we cannot accept the argument . . . that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress." No such exception had been established by judicial decision under former Section 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

Id. at 515-16. *See also Vendo Co., supra*, 433 U.S. at 639.

In reaching this conclusion, moreover, the Court acknowledged—in language that was to presage its later decision in *Pennzoil v. Texaco*, 107 S. Ct. 1528 (1987)—its full confidence in the ability of state courts to resolve federal issues:

> The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and that the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history, Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of Section 2283 is but

> continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.

Amalgamated Clothing Workers, supra, 348 U.S. at 518. *Cf. Pennzoil, supra*, 107 S. Ct. at 1527-29.

The holding of *Amalgamated Clothing Workers* has been unanimously reaffirmed since. Federal courts do not have the authority to enjoin state court proceedings "merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law or federal procedures." *Atlantic Coast Line, supra*, 398 U.S. at 297-98 (Brennan, J., dissenting); *see also id.* at 294 (majority opinion); *Vendo Co., supra*, 433 U.S. at 639.

Accordingly, Judge Gee's lengthy analysis of the importance of federal *forum non conveniens* principles to cases brought in admiralty is of no relevance to the Anti-Injunction Act issue here presented. Those precise preemption issues can be raised and resolved in the Texas state courts. If Judge Gee is correct, there is no reason to expect that the Texas courts will reject his view. And if they do, of course, this Court sits as final arbiter to review any erroneous decision on federal preemption. Whatever the outcome, that is the process that must be followed in this case. It should not be derailed through the use of a federal court injunction that would end the state court proceedings prematurely.

II. PRINCIPLES OF EQUITY, COMITY AND FEDERALISM PRECLUDE THE ISSUANCE OF THE INJUNCTION AT ISSUE IN THIS CASE.

As the Court cautioned in *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), an exemption from the jurisdictional bar of Section 2283 does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Thus, even were this Court to find that

the Anti-Injunction Act did not preclude issuance of an injunction, the question would remain whether that power should have been exercised in this case. Petitioners submit that it should not.

This conclusion flows from a basic understanding of *forum non conveniens* principles and a respect for the independence and authority of the state courts. In this case, the courts of Texas have a substantial interest in resolving the open question concerning the scope of the Texas statute. Moreover, those courts are as capable as the lower federal courts of identifying any paramount admiralty concerns that may inhere in the federal *forum non conveniens* doctrine, and they are better able to determine how such concerns should be accommodated in interpreting Texas law.

A. State Courts Have An Overriding Interest In Determining The Scope Of Their Own *Forum Non Conveniens* Doctrine.

Although the Anti-Injunction Act is motivated by the desire to "prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, *supra*, 309 U.S. at 9, the prohibitions of Section 2283 are distinct from the traditional notions of equity, comity, and federalism that "soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, *supra*, 107 S. Ct. at 1526 n.9; *see also Vendo Co.*, *supra*, 433 U.S. at 639. Thus, even where the Anti-Injunction Act does not deprive the federal courts of the power to issue an injunction, the cautions borne of comity remain and restrain courts from overusing their power. *Compare Mitchum v. Foster*, *supra*, (§ 1983 is an express statutory exception to Anti-Injunction Act) *with Huffman v. Pursue, Inc.*, 420 U.S. 592, (1975) (finding that abstention may be proper in a § 1983 case) *and Pennzoil*, *supra* (abstention required in § 1983 case). In this case, the proper restraint was not exercised.

This Court has long recognized the unique interests that courts have in deciding whether they will exercise jurisdiction over a case. *United States v. United Mine Workers*, 330 U.S. 258, 291-93 (1947). Despite possible federal concerns, state courts are free to decide the applicability of the principles of *forum non conveniens* according to their own law. *See Missouri v. Mayfield*, *supra*; *cf. Parsons v. Chesapeake & O. Ry.*, *supra*.[22] There are strong justifications for this flexibility. For example, the state court is the one that must face the "[a]dministrative difficulties [that] folow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gulf Oil*, *supra*, 330 U.S. at 508; *see also Piper Aircraft*, *supra*, 454 U.S. at 241 (*forum non conveniens* based on "considerations affecting the court's own administrative and legal problems"); *Koster*, *supra*, 330 U.S. at 524 (same). Because the *forum non conveniens* doctrine does not concern power to adjudicate the dispute or to exercise jurisdiction over the parties, but rather is one affording the court the discretion to decide whether to exercise its power, state courts must be able

---

[22] *Parsons* presented the question whether a state court *forum non conveniens* dismissal was entitled *res judicata* effect in a subsequent motion to transfer in federal district court pursuant to 28 U.S.C. § 1404(a). Explaining why it was not, the Court elucidated how different considerations invariably pertain to different courts. It noted, for example, how docket congestion could vary from one court to the next. *Parsons*, *supra*, 375 U.S. at 73. As the Court concluded, in terms applicable to the issue here,

> These considerations no more than *illustrate* the many variables which might affect the exercise of discretion by a state court, as contrasted to a federal court, in any given case. *Since different factual considerations may be involved in each court's determination*, we hold that a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a).

Id. at 73-74 (emphasis added).

to account for purely local concerns and interests. *Gulf Oil, supra.* As a result, matters of local docket control—and questions whether a state wishes to hear all cases within its constitutional power—are committed to the state courts' discretion.

The "open courts" provisions of the Constitution and laws of the State of Texas elevate this *forum non conveniens* determination to a matter of particularly high state concern. An "open courts" provision has appeared in each of Texas's six constitutions, as well as the Constitution of the Republic of Texas of 1836. It presently provides that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Texas Const., Article I, § 13. The "open forum" statute implements this constitutional directive. *See* Section 71.031, Tex. Civ. Prac. & Rem. Code (Vernons 1986), quoted in note 7, *supra.* Accordingly, whether and how dismissals for *forum non conveniens* considerations are to be recognized in admiralty and other cases brought under that statute implicate important issues of state constitutional law. Moreover, as the Fifth Circuit recognized in this case, *see* Pet. App. II App. at 29-33, *citing Couch v. Chevron Int'l Co.*, 682 S.W.2d 534 (Tex. 1984), the Supreme Court of Texas has explicitly reserved these questions for its resolution in an appropriate case.

Without even inquiring into the State's unique interest in having its own courts decide the reach of their jurisdiction, the Fifth Circuit mistakenly concluded that federal *forum non conveniens* considerations preempt the field. Rather than strain to establish federal supremacy over state determinations of *forum non conveniens*, however, the federal court should first have considered Texas's weighty interest in having its own courts determine, at least as an initial matter, whether and how to accommodate the federal *forum non conveniens* concerns

in this case.[23] In short, the court below simply ignored the principles of comity and federalism that obviously

---

[23] Moreover, Judge Gee's analysis of preemption contradicts this Court's cases on the subject. Where Congress has enacted legislation over a field, the structure of preemption analysis is well settled. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-82 (1983); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203-04 (1983); *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 317-18 (1981). "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). This assumption must of course yield when Congress has expressly preempted state law, *see, e.g., Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983), or has so pervasively regulated an entire sphere as to leave no room for enforcement of state laws on the same subject. *See, e.g., City of Burbank v. Lockheed Terminal, Inc.*, 411 U.S. 624, 633 (1973). It must also yield when there is a specific conflict with federal law, such as where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This Court has stated that the preemption inquiry "is essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Kalo Brick, supra*, 450 U.S. at 317-18; *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

Far from undertaking this analysis, Judge Gee advanced "five concepts or clusters of ideas" for his preemption analysis. Pet. App. II at 41. The short response to Judge Gee's assertions is that Congress has neither federalized the maritime *forum non conveniens* inquiry or so pervasively regulated maritime law that state enforcement of its own *forum non conveniens* law would conflict with the statutory scheme. While federal substantive law must govern conduct, rather than preempting the field of state procedures, Congress has allowed for their application in the savings to suitors clause. *See* Part II B, *infra.*

are implicated here. On this basis alone, its decision should be reversed.[24]

B. Federal Law Does Not Preempt State *Forum Non Conveniens* Law In Admiralty Cases.

Finally, while we believe that the matter is not properly presented for the Court's resolution at this time, it is worth noting that Judge Gee's lengthy analysis of maritime law and federal *forum non conveniens* principles is flawed. Although Judge Gee properly recognized that this Court's holding in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986), dictates that maritime actions brought in state court be governed by the "so called 'reverse-*Erie*' doctrine requiring that the *substantive* remedies afforded by the States conform to the governing maritime standards," *id.* 106 S. Ct. at 2495 (emphasis added), he mistakenly applied that principle to the procedural concerns implicated by the *forum non conveniens* doctrine. This reflects a substantial error of analysis; the procedural interests of the adjudicating forum are at root in the substantive/procedural law distinction in both the *Erie* and reverse-*Erie* contexts. Thus, even when a particular body of substantive law must govern a cause of action, the forum applying that substantive law is fully entitled to use its own procedural rules, including local principles of *forum non*

[24] These principles find expression in the abstention cases of this Court, which also indicate that the federal court should have stayed its hand. Because "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," different aspects of different abstention cases apply to this case. *Pennzoil, supra*, 107 S.Ct. at 1526 n.9. For example, the substantial state interest in having its own courts interpret a provision reflective of the Texas Constitution indicates that *Thibodaux*-type abstention applies to the facts of this case. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). Furthermore, since the state courts are equally capable of deciding any federal preemption issue, *Younger* abstention would apply as well. *See Younger v. Harris*, 401 U.S. 37 (1971); *Pennzoil, supra.*

conveniens. See, e.g., In re Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir. 1987) (en banc); *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *see generally* 1A Moore's Federal Practice ¶ 0.317[7], at 3238-39 (federal court sitting in diversity should follow its own *forum non conveniens* rules); 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3828, at 194 (same).

The proper choice of substantive and procedural law is no different in maritime actions. *See Black Diamond S. S. Corp. v. Robert Stewart & Sons (The Norwalk Victory)*, 336 U.S. 386 (1949) (Frankfurter, J.) (finding admiralty limitation proceeding procedural and applying forum law); *Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718 (1914) (Holmes, J.) (finding admiralty limitation proceeding substantive and applying foreign law). *See generally* Gilmore & Black, *The Law of Admiralty* §§ 10-43—10-45 (2d ed. 1975). Only where a state law is "a part of the very *substance* of [a] claim and cannot be considered a mere incident of form or *procedure*" is it preempted by federal maritime law. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 240 (1942) (emphasis added).[25]

The reason for this distinction, as well as the rule that determines whether a matter is to be considered substantive or procedural, is clear. Substantive rules must be uniform to prevent conflicting state laws from "extend[ing] as a conduct-governing enactment on the high-seas." *Tallentire, supra*, 106 S.Ct. at 2495. Thus, only if state law is likely to effect conduct in a way that

[25] Judge Gee was thus clearly incorrect when he stated that *Garrett* stood for the proposition that federal maritime preemption can apply to "procedural" matters. Pet. App. II at 52. This Court obviously considered the federal burden of proof at issue in *Garrett* to be a matter of substance and not procedure. It therefore held that the conflicting state burden of proof had been preempted by federal law.

conflicts with federal law is it substantive and not to be applied. Because the exercise of jurisdiction under the Texas "open forum" statute would not effect underlying conduct,[26] the Texas courts may adopt whatever procedural rules they deem appropriate. *Id.; Madruga v. Superior Court*, 346 U.S. 556, 360-61 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924). The Texas courts would therefore be free to accommodate the concerns reflected in the federal *forum non conveniens* doctrine or not, as they see fit.

Judge Gee's notions of the mandatory nature of federal *forum non conveniens* determinations in maritime matters also reflect mistaken concepts of the role of the federal courts and an exaggerated concern that the Texas courts will open the floodgates to foreign litigation. In the first place, his expressed concern for international relations is misplaced; foreign policy is not a matter set by the judiciary but by the elected representatives of government. For almost as long as the Republic has existed, Congress has chosen to allow states to adjudicate in their own courts claims based on maritime law.[27]

---

[26] The Texas legislature assured this result by providing in the statute that the Texas courts "shall apply the rules of substantive law that are appropriate under the facts of the case." *See* Tex. Civ. Prac. & Rem. Code, § 71.031(c) (Vernon 1986); quoted in note 7, *supra*.

[27] The Judiciary Act of 1789, § 9, 1 Stat. 76, embodied the "savings to suitors" clause that preserved the right of maritime plaintiffs to proceed in state court on in personam actions, and that law has survived to this day without substantive alteration. *See* 28 U.S.C. § 1333; *Madruga, supra*, 346 U.S. at 560 n.12 (1954). *See also* 46 U.S.C. § 767 (analogous savings to suitors provision in DOHSA). At any time in the two-hundred interceding years, Congress could have provided that this grant was subject to the limitation that state courts apply federal procedural principles in deciding *forum non conveniens* motions, but it has not. As the Fifth Circuit has itself recognized, the special maritime rules that apply to venue do not apply to cases brought in state court under the saving to suitors clause. *T.N.T. Marine Service Inc. v. Weaver Shipyards & Dry Docks*, 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). Moreover, despite the passage of other acts dealing with maritime jurisdiction, *see, e.g.*, 46 U.S.C. §§ 181-189 (allowing shipowner to bring admiralty limitation proceeding), maritime *forum non conveniens* law has not been federalized. *Petition of the Texas Co. (The Washington)*, 213 F.2d 479 (2d Cir.) ("the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine"), *cert. denied*, 348 U.S. 829 (1954).

Thus, far from preempting the field, Congress clearly preserved concurrent state court jurisdiction over actions that could have proceeded as maritime claims in federal court, and it has allowed states to adopt procedures that differ from those in federal court.[28] If Congress believed that a uniform *forum non conveniens* rule was required for policy reasons or otherwise, it could have enacted that standard. Absent such legislation, the federal courts should not invoke foreign policy concerns on an *ad hoc* basis to fashion a new rule.

Judge Gee's concern that Texas will open the floodgates to foreign litigation is similarly misplaced. The "open forum" statute itself limits actions to those where the foreign citizen is from a country affording equal treaty rights to the United States, and the statute further requires that the Texas courts apply the "appropriate" substantive law. *See* Section 71.031(a)(3), (c), quoted in note 7, *supra*. Moreover, there are constitutional limitations on what law a state may apply. *See Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). Likewise, the Due Process Clause limits any state's attempt to bring foreigners into court in inappropriate

---

[28] Such different procedures are not uncommon. For example, the right to such remedies as maritime attachment and garnishment, as well as the right to trial by jury, vary depending on whether the suit is a federal admiralty claim or a state claim pursued under the saving to suitors clause. *T.N.T. Marine Service, supra*, 702 F.2d at 586-87. Because such "[n]umerous and important consequences flow from the . . . decision to bring [a maritime] action in state court," *Alleman v. Bunge Corp.*, 756 F.2d 344, 345 (5th Cir. 1985), Judge Gee's novel *forum non conveniens* theory would not assure the uniformity he seeks.

cases. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). As this Court held last Term, due process not only requires the minimum contacts that Judge Gee considers to be an insufficient safeguard, it also requires that the exercise of jurisdiction be "consistent with fair play and substantial justice." *Asahi Metal Industry v. Superior Court of California*, 107 S.Ct. 1026, 1033-35 (1987); *see also International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (employing "traditional notions of fair play and substantial justice"); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (same).

In sum, even if there were no Anti-Injunction Act bar in this case, the decision below should be reversed. While proper resolution of the issue of federal preemption of *forum non conveniens* principles in maritime actions is not presented here, we believe that Judge Gee's decision ultimately will prove to have been incorrect. More significantly, at this point in the litigation, it is clear that the issue should be allowed to be considered by the Texas courts.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully Submitted,

JOEL I. KLEIN
DAVID BOYD
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

BENTON MUSSELWHITE
609 Fannin, Suite 517
Houston, TX 77002
(713) 222-2288
Counsel of Record

JOSEPH C. BLANK
1119 First Texas Building
470 Orleans Street
Beaumont, TX 77701
(409) 833-2245
Counsel for Petitioners

Supreme Court, U.S.
FILED
FEB 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners

v.

EXXON CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

JAMES PATRICK COONEY
Counsel of Record

BRIAN SCOTT DETRICK
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

Counsel for Respondents

Of Counsel:
ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the district court properly enjoined Petitioners from relitigating the same cause of action in state court which had previously been dismissed by the same federal district court under the maritime doctrine of *forum non conveniens*.

2. Whether a state court hearing a maritime personal injury or death claim pursuant to the "savings to suitors" clause of 28 U.S.C. § 1333 must apply federal maritime *forum non conveniens* rules when the claim has substantial contacts with a foreign forum.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition in the Court Below.	3
B. Facts of the Case.	5
C. Decision Below.	6
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. A Federal Court is empowered to enjoin a state court proceeding to prevent the relitigation of an issue finally decided by the federal forum.	11
II. State Courts are bound to apply the federal maritime rule of *forum non conveniens* to maritime cases involving claims for injury or death to non-resident aliens.	16
A. The *forum non conveniens* rule under consideration constitutes a substantive maritime rule of decision.	18
B. A state court is required to apply the maritime *forum non conveniens* rule under the uniformity doctrine.	27
III. The injunction below was appropriate because the *forum non conveniens* dismissal by the federal court is binding on the state court.	36
CONCLUSION	40
CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

CASES	Page
Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955)	32
Asahi Metal Industry v. Superior Court of California, ____U.S.____, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987)	31
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	29
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	31
Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959)	18
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	25
Canada Malting Co. v. Paterson Steamships, 285 U.S. 413 (1932)	23
Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982)	19, 20, 21, 24
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918)	27
Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983)	3, 21
Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1985)	4
Commissioner v. Sunnen, 333 U.S. 591 (1948)	15
Couch v. Chevron International Co., 682 S.W.2d 534 (Tex. 1984)	29
Cruz v. Maritime Co. of Philippines, 702 F.2d 47 (2d Cir. 1983)	19
Delta Airlines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582 (11th Cir. 1983)	13
DeMateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)	19
DeOliveira v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983)	19
Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987)	2, 6, 7, 15, 27, 33, 34
Fisher v. Agios Nicholos V, 628 F.2d 308 (5th Cir. 1980), *cert. denied sub nom., Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816 (1981)	19
Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)	37, 38
Garrett v. Moore-McCormick Co., 317 U.S. 239 (1942)	27
Gonzalez v. Naviera Neptuno, A.A., 832 F.2d 876 (5th Cir. 1987)	19, 21, 24
Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961)	30

CASES — Page

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 8, 19, 20, 21, 23, 24, 39
Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978) 13
Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970) .. 8, 19, 20, 21
Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 31
In Re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc) 21, 25
International Association of Machinists & Aerospace Workers v. Nix, 512 F.2d 125 (5th Cir. 1975) 12
Jackson v. Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857) 34
Johnson v. Radford, 449 F.2d 115 (5th Cir. 1971) 13
Kassapas v. Arkon Shipping Agency, 485 So. 2d 565 (La. App.), *writ denied*, 488 So. 2d 203 (La.), *cert. denied*, ____U.S.____, 107 S. Ct. 422 (1986) 12, 30, 40
Kassapas v. Arkon Shipping Agency, 578 F. Supp. 400 (S.D.N.Y.), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984) ... 12, 40
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 27
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) .. 28
Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. 1984) 19, 26
Lauritzen v. Larson, 345 U.S. 517 (1953) 8, 19, 20, 21, 22
McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313 (5th Cir. 1986) 18, 20
Missouri ex. rel. Southern Railway v. Mayfield, 340 U.S. 1 (1950) 26, 38
Mitchum v. Foster, 407 U.S. 225 (1972) 11, 13
Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481 (10th Cir. 1983) 19
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) .. 9, 28, 29
Panama R. Co. v. Johnson, 264 U.S. 375 (1924) 27
Parsons v. Chesapeake & Ohio Railway, 375 U.S. 71 (1963) 26, 38
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 13
Pastewka v. Texaco, Inc., 565 F.2d 851 (3rd Cir. 1977) .. 10, 16, 37
Piper Aircraft Corp. v. Reyno, 454 U.S. 235 (1981) 8, 19, 21
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 27
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 8, 19, 21, 22
Scott v. Hunt Oil Co., 398 F.2d 810 (5th Cir. 1968) 13
Seaboard Coast Line Railroad v. Union Camp Corp., 613 F.2d 604 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980) 11, 12

CASES — Page

Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985) 30
Southern California Petroleum Corp. v. Harper, 273 F.2d 715 (5th Cir. 1960) 13
Southern Pacific Co. v. Jensen, 224 U.S. 205 (1917) 27
Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977) 12
Szumlicz v. Norwegian America Line, Inc., 698 F.2d 1192 (11th Cir. 1983) 19
Teas v. Twentieth Century-Fox Film Corp., 413 F.2d 1263 (5th Cir. 1969) 12
The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866) 35
Touchy v. New York Life Insurance Co., 314 U.S. 118 (1941) 11
Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983) 13, 14, 18, 19, 21, 24, 26
Villar v. Crowley Maritime Corp., 782 F.2d 1478 (9th Cir. 1986) 19
Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 12
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 30
Zschernig v. Miller, 389 U.S. 429 (1968) 31, 34

Page

UNITED STATES STATUTES

28 U.S.C. § 1291 26
28 U.S.C. § 1333 ..... 8, 28, 35
28 U.S.C. § 1404(a) 25, 38, 39
28 U.S.C. § 1602 *et seq.* 31
28 U.S.C. § 1651 ..... 7, 11
28 U.S.C. § 1651(a) 2
28 U.S.C. § 1738 13
28 U.S.C. § 2283 ..... 2, 3, 7, 11, 15
33 U.S.C. § 901 *et seq.* 17
43 U.S.C. § 1331 *et seq.* 28
45 U.S.C. § 51 *et seq.* 38
46 U.S.C. § 688 ..... 17, 22
46 U.S.C. § 688(b) 17, 31
46 U.S.C. § 761 *et seq.* 17, 28

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 7, 26
Rule 56 ..... 7, 8, 26
Rule 60(b) 3

TEXAS CIVIL PRACTICE AND REMEDIES CODE

Section 71.031(c) 39
Section 71.081 29

MISCELLANEOUS

Bickel, *The Doctrine of Forum Non Conveniens Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 315 (1943) 24
R. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964) 31

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners

v.

EXXON CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

To the Honorable Justices of the Supreme Court of the United States:

COME NOW Exxon Corporation and Esso Tankers, Inc.,* Respondents (sometimes referred to jointly as "Exxon"), and file this their Brief and would respectfully show to the Court as follows:

* Exxon Corporation has numerous subsidiaries and affiliates. Esso Tankers, Inc. is a wholly, but indirectly, owned subsidiary of Exxon Corporation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit under review is reported under the style of *Exxon Corporation v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987).

JURISDICTION

The statement of jurisdiction set out in Petitioner's Brief is correct.

STATUTE INVOLVED

The statute involved in this case is the Anti-Injunction Act, 28 U.S.C. § 2283, which provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

The Petitioners Chick Kam Choo and her attorneys Benton Musslewhite and Joseph C. Blanks seek review of a decision of the United States Court of Appeals for the Fifth Circuit rendered on May 21, 1987, affirming the judgment of the United States District Court for the Southern District of Texas permanently enjoining the Petitioners pursuant to Sections 1651(a) and 2283 of Title 28, U.S.C., from prosecuting or commencing any actions against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977.

The central issue presented for review is whether the dismissal under the doctrine of *forum non conveniens* of a maritime action brought by a foreign claimant for the death of a foreign maritime worker occurring outside of the United States precludes litigation of the same claim in a state court and thus supports an injunction prohibiting such litigation under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283.

A. Course of Proceedings and Disposition in the Court Below.

On March 14, 1978, Chick Kam Choo, a resident of the Republic of Singapore, filed a civil action in the United States District Court for the Southern District of Texas seeking to recover in behalf of herself and her children for the wrongful death of her husband Leong Chong, a Singapore shipyard worker.

On July 31, 1980, an Order of Dismissal and a Final Judgment were entered, holding, *inter alia,* that Singapore law applied, that Leong Chong was not a Jones Act seaman as a matter of law, and that the action be dismissed under the maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore.

Chick Kam Choo did not file a timely appeal from the court's Final Judgment, but filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and an appeal was taken. The district court's denial of relief under Rule 60(b) was affirmed in *Chick Kam Choo v. Exxon Corp.,* 699 F.2d 693 (5th Cir. 1983). After Petitions for Rehearing and Rehearing En Banc were denied by the Fifth Circuit,

Chick Kam Choo filed a Petition for Writ of Certiorari with this Court, which was denied on October 3, 1983, 464 U.S. 826 (1983).

On January 6, 1984, Chick Kam Choo filed an Original Petition in the 270th Judicial District Court of Harris County, Texas, which was substantially identical to the Complaint filed in 1978 in the Southern District of Texas. The cause filed in state district court was removed to the Southern District of Texas, Houston Division, on grounds of diversity of citizenship and alienage jurisdiction. The district court denied Chick Kam Choo's motion to remand the case, and granted Exxon's Motion to Dismiss. Notice of Appeal was filed and on July 8, 1985, the Fifth Circuit Court of Appeals reversed the district court, holding that the necessary subject matter jurisdiction was lacking and vacated the district court's judgment with instructions that the case be remanded to state court. *Chick Kam Choo v. Exxon*, 764 F.2d 1148 (5th Cir. 1985). The Order remanding the case was entered by the district court on August 16, 1985.

On February 11, 1986, the instant action was commenced. Exxon filed a Motion for Summary Judgment and Application for Permanent Injunctive Relief, which was granted by the district court on May 15, 1986. The judgment of the district court enjoining the Petitioners from prosecuting or commencing any action against the Respondents in the courts of the State of Texas or any other state of the United States arising out of or related to the death of Leong Chong in Singapore in 1977 was affirmed by the Fifth Circuit on May 21, 1987 and rehearing and rehearing *en banc* were denied on June 24, 1987.

B. Facts of the Case.

The action decided by the Southern District of Texas in 1980 and the cause now pending in the 270th Judicial District Court of Harris County, Texas, are essentially identical claims seeking to recover for the death of Leong Chong, a resident of Singapore, who was killed while working onboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs at a shipyard in Singapore during March 1977. The M/V ESSO WILHELMSHAVEN was at all relevant times a Liberian flag vessel owned by Esso Tankers, Inc. and operated by Exxon International, an unincorporated division of Exxon Corporation. Exxon and Esso Tankers were the defendants in the original federal action and the defendants in the cause pending in Texas court. Thus, the parties in the two actions are identical.

In the Original Complaint filed in the Southern District of Texas, the Petitioner, acting both individually and in a representative capacity, sought to recover for the death of her husband Leong Chong under the Jones Act, the general maritime law of the United States, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act, and the wrongful death statutes of the State of Texas. Exxon filed a Motion for Partial Summary Judgment and to dismiss under the maritime doctrine of *forum non conveniens*. The district court explicitly held that American law did not apply and granted Exxon's Motion for Partial Summary Judgment as to the claims presented under the Jones Act, Death on the High Seas Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law of the United States. The Court granted a conditional dismissal of the foreign

law claims on the grounds of *forum non conveniens,* provided that Exxon consented to the jurisdiction of the appropriate Singapore court. No attempt to commence an action in the courts of Singapore has been made by Petitioner or her attorneys.

C. Decision Below.

The judgment of the district court was affirmed by a split panel of the Fifth Circuit. Circuit Judge Gee wrote the opinion of the court in which he upheld the injunction of the state court proceedings on the basis of *res judicata,* holding:

> Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts have admiralty jurisdiction.

817 F.2d at 324. Chief Judge Clark concurred in the result, without reaching issues of sovereignty, preemption, comity or *res judicata,* but also agreed with Judge Gee's analysis "that the maritime nature of the order entered in the present controversy would preempt the inconsistent exercise of state court jurisdiction." 817 F.2d at 325. Circuit Judge Reavley dissented on the gound that it was up to "the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination." 817 F.2d at 325.

Judge Gee based his opinion on factors of *res judicata.* As he observed early in the opinion "the only real issue in this case is whether the district court's dismissal of the first action bound all subsequent proceedings in Houston

courts." 817 F.2d at 309. This issue was further refined into the question of "whether the *forum non conveniens* issue is the same in Houston federal and state trial courts." 817 F.2d at 312. Judge Gee concluded that the maritime *forum non conveniens* doctrine *preempted* state law under the uniformity doctrine. On this basis he further concluded that the *forum non conveniens* issue *was* the same in federal court and state court, so that the prior federal dismissal constituted a direct estoppel precluding any reconsideration of the issue by the state court.

SUMMARY OF ARGUMENT

1. Under the All Writs Act, 28 U.S.C. § 1651, and the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court is empowered to enjoin the reconsideration by a state court of an issue finally decided by the federal court. This power is to be exercised to prevent unnecessary friction between the state and federal courts and to prevent interference with a prior federal judgment. In order to justify the issuance of an injunction, the prior federal judgment must preclude relitigation of the issues decided. Under federal *res judicata* rules, a federal court is entitled to decide the scope and preclusive effect of its own judgment. Under Fifth Circuit precedent, a dismissal of a maritime personal injury or death claim under the doctrine of *forum non conveniens* for adjudication in a foreign forum, predicated, at least in part, on a determination that foreign law controls, is similar to a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure or a summary judgment under Rule

56. Such a dismissal precludes further litigation in the United States. Since a state court is required under the uniformity doctrine to apply the same standard as the federal court in such cases, a prior federal dismissal of a maritime tort claim *forum non conveniens* is *res judicata* as to the state court and justifies the issuance by the federal court of an injunction to prevent the subsequent prosecution of the same claim in the state court.

2. A state court entertaining a maritime personal injury or death claim pursuant to its concurrent maritime jurisdiction under the "saving to suitors" clause, 28 U.S.C. § 1333, is bound to apply the federal maritime rule of *forum non conveniens*. The rule constitutes a substantive rule of decision of maritime law and, as such, a state court exercising its concurrent maritime jurisdiction under the savings clause is bound to apply the rule pursuant to the uniformity doctrine.

A. The maritime *forum non conveniens* doctrine combines the policy considerations underlying the maritime choice of law rules articulated in *Lauritzen v. Larson*, 345 U.S. 517 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) and the federal *forum non conveniens* rule of *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981). Its focus is not so much on factors of private convenience as the public interest concerns that arise out of the need to accommodate and balance competing national interests in an area where international law and domestic

law intersect. The maritime *forum non conveniens* rule constitutes a framework in which our maritime courts can decide whether the United States is the appropriate forum in cases with predominately foreign contacts. In this regard, the rule is fundamentally different from the *forum non conveniens* rule directed to the determination of the most appropriate or convenient American forum in cases indigenous to this country. The maritime rule is directed to the resolution of the problem of whether it would be appropriate to adjudicate the case in *any* United States court, whether state or federal. Because of the question it resolves, the maritime *forum non conveniens* rule must be binding on all American courts. If a second American court is permitted to entertain a case after the first court has decided, pursuant to the maritime rule that adjudication in the United States is not appropriate, the maritime rule becomes a nullity. If the maritime rule is to have any efficacy, it must be treated as a substantive rule and not merely a matter of procedure.

B. In exercising their concurrent maritime jurisdiction, state courts are required to follow federal maritime law under the uniformity doctrine. *See generally Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). In deciding whether a state court is bound to follow the maritime *forum non conveniens* rule, the court below focused on factors indicating that federal maritime law should preempt state law when a uniform rule will facilitate maritime commerce and when maritime law impinges on transnational or international relations. In the very simplest of terms, the decision below is predi-

cated on the proposition that federal law must control the international role of all American courts. Maritime law is in a very real sense international law. It must be concerned with the accommodation of competing interests on the international level. At the same time, it must be concerned with the accommodation of state and federal interests under our federal system. On the international level, it is necessary that our courts speak with a unified voice. Because of this, state courts must accommodate themselves to the need for uniformity and be obliged to follow the maritime *forum non conveniens* rule. Otherwise, the states would be in a position to frustrate and nullify the international accommodation represented by the maritime rule.

3. Once it is concluded that a state court is required to apply the maritime *forum non conveniens* doctrine in an appropriate case, it follows that a prior dismissal of the same claim by a federal court under the doctrine would preclude a reconsideration of the issue by a state court under traditional concepts of *res judicata*. *See Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). In such an instance, the federal court would be entitled to enjoin the state court from reconsidering the prior federal dismissal pursuant to the relitigation exception of the Anti-Injunction Act. The action of the district court in issuing such an injunction in this case was not only correct, but necessary, and must be affirmed.

ARGUMENT

I. A Federal Court is empowered to enjoin a state court proceeding to prevent the relitigation of an issue finally decided by the federal forum.

The All Writs Act, 28 U.S.C. § 1651, authorizes "The Supreme Court and all courts established by Act of Congress [to] issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." This broad grant of authority to effectuate the jurisdiction of our federal courts is circumscribed by the general prohibition of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The phrase "to protect or effectuate its judgments" was added by Congress in 1948 to the Anti-Injunction Act in response to this Court's decision in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), to make clear that the courts of the United States have the power to protect their judgments from the threat of re-examination in a state proceeding. This power constitutes the "relitigation exception." *See* Revision Notes to 28 U.S.C. § 2283.

While the Anti-Injunction Act circumscribes federal interference with state courts, the relitigation exception allows a federal court to prevent the relitigation of an issue or claim finally decided by a prior federal judgment involving the same parties in a state court proceeding. *Mitchum v. Foster*, 407 U.S. 225 (1972); *Seaboard Coast*

Line Railroad Co. v. Union Camp Corp., 613 F.2d 604 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980) (quoting *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975). Such an injunction is designed to prevent unnecessary friction between the state and federal courts and to prevent any interference "with the federal court's judgment." *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1266 (5th Cir. 1969). The injunction also "assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review." *International Association of Machinists & Aerospace Workers v. Nix, supra*, 512 F.2d at 130.[1] The boundaries of *res judicata* and collateral estoppel may be protected by an injunction when necessary to prevent harassment of successful litigants and a consistent theme of federal law mandates the enjoining of state court proceedings regarding issues which have been fully and finally

1. A classic example of this problem is the case of *Kassapas v. Arkon Shipping Agency*, involving the death of a Greek national which occurred in the Soviet Union while serving aboard a Liberian vessel owned by a Greek corporation. The claim was dismissed pursuant to the maritime doctrine of *forum non conveniens* by the federal district court for the Southern District of New York, 578 F.Supp. 400 (S.D.N.Y.), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984). The identical claim was subsequently filed in a Louisiana state court, which refused to consider itself bound by the prior federal dismissal or by the maritime rule of *forum non conveniens* and tried the matter to conclusion. 485 So.2d 565 (La. App.), *writ denied*, 488 So.2d 203 (La.), *cert. denied*, _____U.S._____, 107 S. Ct. 422 (1986).

adjudicated. *Hardwick v. Doolittle*, 558 F.2d 292, 295 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978).[2] The prior judgment must be such as to preclude the relitigation of the issue under federal *res judicata* rules. *Mitchum v. Foster, supra*. The federal court is empowered to determine the scope and preclusive effect of its prior judgment according to federal law in exercising its discretion to enjoin the re-litigation of the issue in the state court. *See, e.g., Delta Airlines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983); *Johnson v. Radford*, 449 F.2d 115 (5th Cir. 1971); *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960). However, the federal court's discretion must be exercised prior to any determination of the preclusive effect of the prior federal judgment by the state court. Once the state court has acted, the Full Faith and Credit Act, 28 U.S.C. § 1738, prevents the federal court from issuing an injunction to nullify the state court's determination, and any federal remedy is waived. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

As will be demonstrated below, the injunction issued by the Southern District of Texas in this case was to prevent the relitigation in state court of an issue finally determined by a federal court and constituted a valid exercise of the power of a federal court under the relitigation exception of the Anti-Injunction Act.

The Fifth Circuit defined the scope of a maritime *forum non conveniens* dismissal in *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983). In *Vaz Borralho*, the Fifth

2. *See Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968) (upholding a federal district court's imprisonment for contempt of a previously unsuccessful federal litigant for relitigating the same cause of action in state court).

Circuit, faced with a pleading containing theories quite similar to those advanced by Petitioners in the original federal complaint, explained the effect of a federal *forum non conveniens* dismissal:

> Because the appellants asserted claims under American law only, once the district court determined that American law did not apply, "it could have properly dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, and, if deposition and affidavits were considered [as they were in this case] have granted a summary judgment under Rule 56." *Chiazor,* 648 F.2d at 1028 n.7. *See also, Serrano v. Empresa Lineas Maritimas Argentinas,* 257 F.Supp. 870, 872 (D.C. Md. 1966); Comment: *A New Look at Lauritzen v. Larsen, Choice of Law in Forum Non Conveniens,* 38 La.L.Rev. 957, 968-969 (1978). The district court, however, proceeded to dismiss the case under the doctrine of *forum non conveniens.*

696 F.2d at 390-91. The Court noted in a footnote:

> As in *Chiazor,* appellants here do not contend that the district court should have retained jurisdiction if Brazilian law applied. Their sole argument here and in the lower court was the dismissal for *forum non conveniens* was inappropriate if American law applied. *Chiazor,* 648 F.2d at 1020 n.8.

696 F.2d at 391 n.10.

Summary judgment could have been granted to the entirety of this case under the analysis employed by the Fifth Circuit since only American law issues were asserted in the original action. JA 3-7. Such a judgment would have had an obvious *res judicata* effect on any subsequent

attempt to litigate the claim. However, the case was dismissed without prejudice under the *forum non conveniens* doctrine so that the Petitioner's foreign law claims were preserved. This "carving-out" of a narrow exception to the *res judicata* effect of the federal court's judgment was intended to benefit Petitioner and allow her another attempt to litigate her claim in the proper foreign forum. However, the benevolence of the federal court has been subverted by the Petitioner's initiation of the state court proceedings. There can be no doubt that the controversy was fully adjudicated under the meaning of 28 U.S.C. § 2283, as far as the laws of the United States are concerned, regardless of what the dismissal is called.

Under the uniformity doctrine of our maritime law, the Texas courts are required to apply the same maritime standard as was applied by the federal court. The claims asserted in the two courts are the same and the parties are identical.[3] Furthermore, none of the objective facts upon which the prior federal *forum non conveniens* dismissal was based have changed. Therefore, the issue before the state court is identical to the issue previously decided by the federal court's final judgment. Under normal preclusionary rules, the prior federal judgment prevents a

---

3. The repleading of the same cause of action is apparent from a review of the original federal complaint and the state court petition. Compare JA at 3-5 with JA at 37-43. The Fifth Circuit recognized that the cause of action asserted in both the state and federal actions were "identical." See the opinion below, 817 F.2d at 309. Petitioners are incorrect in their assertion that the two pleadings do not constitute the same cause of action. The additional theories pled in the state court pleading do not create a new cause of action. Any theories which Petitioners failed to raise during the course of the original proceeding were waived and have merged into that judgment. *See, e.g., Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).

reconsideration of the *forum non conveniens* dismissal by the state court. *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977). This in itself would be sufficient to support the injunction entered below. However, substantial uncertainty exists as to whether the courts of the State of Texas would consider themselves bound by the prior federal judgment. In such a circumstance, an exercise of the powers granted to federal courts under the relitigation exception was not only appropriate,[4] but necessary to "protect and effectuate" the prior federal judgment and to prevent possible interference by a state with a well articulated policy of our maritime law.

II. State Courts are bound to apply the federal maritime rule of *forum non conveniens* to maritime cases involving claims for injury or death to non-resident aliens.

In 1986, the United States District Court for the Southern District of Texas enjoined the Petitioner from prosecuting claims for the death of her husband in the courts of the State of Texas or any of the states of the United States in order to protect and effectuate its prior judgment. That judgment, entered in 1980, held that the law of the Republic of Singapore controlled Petitioner's substantive rights, dismissed the Petitioner's claims under the maritime law of the United States, and, finally, dismissed what remained of the action under the maritime doctrine of *forum non conveniens* for further proceedings

4. Petitioners have not claimed in this Court that other requisite factors necessary for an injunction (i.e. irreparable harm or lack of an adequate remedy at law) are lacking. Petitioners have only argued that the injunction is barred by the Anti-Injunction Act.

in Singapore.[5] (JA at 34-35) Although in the state court, Petitioner asserted claims under the Jones Act and the maritime law of the United States generally (JA at 37-44), the Petitioner has indicated that these claims have in effect been withdrawn and her state court claims arise entirely under the laws of the State of Texas and the Republic of Singapore. (Petitioner's Brief, p.4, n.5).[6] The claim asserted nevertheless remains a maritime claim since it involves the death of a maritime worker on navigable water.

At issue here is whether the prosecution of the Petitioner's state court claim can be enjoined by a federal court pursuant to the relitigation exception of the Anti-Injunction Act. The validity of the injunction must turn on the preclusive effect of the prior judgment, and, in particular, the preclusive effect on a state court of a federal *forum non conveniens* dismissal of a maritime death claim controlled by the law of Singapore. This question raises significant issues regarding the nature and content of the doctrine of *forum non conveniens* applicable to maritime personal injury and death claims involving foreign maritime workers and the relationship that must exist between our state and federal courts in dealing with such claims under the Uniformity Doctrine of our maritime law.

5. The 1980 Judgment dismissed claims under the Jones Act, 46 U.S.C. § 688; the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*; the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*; and the general maritime law of the United States. A claim under the Texas Wrongful Death Statute was also dismissed. JA 34-36.

6. This admission concedes the propriety of an injunction prohibiting the relitigation of the dismissal of the federal claims.

A. The *forum non conveniens* rule under consideration constitutes a substantive maritime rule of decision.

In recent years, a large number of claims have been asserted in American courts by foreign maritime workers or their dependents for personal injuries and deaths occurring in the territorial or adjacent waters of nations other than the United States. By far the greater proportion of these claims appear to have involved alien offshore oil workers injured or killed in waters adjacent to a foreign nation while employed, directly or indirectly, by American corporations. *E.g., McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313 (5th Cir. 1986); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983).[7] A smaller number of these claims appear to have involved more traditional maritime workers injured aboard ships at the time located either on the high seas or in the territorial waters of a foreign nation. *E.g., Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959). This case falls into the latter category.

In response to cases of this nature, our federal courts have developed the *forum non conveniens* rule under consideration to guide them in the determination of whether a particular claim should be resolved under American law in an American court or under the law and in the courts of a sovereign nation with a more predominant interest in the resolution of the claim than the United States. While the development of this maritime *forum non conveniens* doctrine has taken place

7. These types of cases are now specifically excluded from Jones Act and U.S. maritime law coverage under 46 U.S.C. § 688(b).

on a national basis,[8] the development that has taken place in the Fifth Circuit is most relevant to the case at hand.[9] The leading cases in the Fifth Circuit which articulate the *forum non conveniens* approach taken by the federal district court are *Vaz Borralho v. Keydril Co., supra*, 696 F.2d at 384 and *Chiazor v. Transworld*

8. During the thirty-four years between *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft v. Reyno*, 454 U.S. 235, 240 (1981), the Federal Circuit courts produced a substantial body of case law regarding *forum non conveniens* in the maritime context. *See, e.g., Villar v. Crowley Maritime Corp.*, 782 F.2d 1478 (9th Cir. 1986); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian America Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3rd Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (all following the basic rule as announced in *Vaz Borralho, supra*, by the Fifth Circuit); *compare Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983).

9. The *forum non conveniens* law of the Fifth Circuit is quite well developed. The Fifth Circuit approach, as embodied within the original federal dismissal, mandated a choice of law determination employing the *Lauritzen/Rhoditis/Romero* factors. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953). If American law applied, then the district court could not dismiss on *forum non conveniens* grounds. If American law did not apply, the court would then look to convenience factors.

This approach finds its seminal Fifth Circuit case in *Fisher v. Agios Nicholos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied sub nom., Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816 (1981). Subsequent Fifth Circuit opinions addressed the scope and function of a conditional *forum non conveniens* dismissal, *DeOliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), and the finality of a *forum non conveniens* dismissal for purposes of appeal, *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir. 1984). Recently, the Fifth Circuit liberalized its *forum non conveniens* approach to enable a federal district court to dismiss a claim on *forum non conveniens* grounds, notwithstanding the applicability of American law. *Gonzalez v. Naviera Neptuno, A.A.*, 832 F.2d 876 (5th Cir. 1987).

Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982). *Chiazor* explains the analysis followed by the federal district court in the case at bar:

> . . . prior to dismissing a case for *forum non conveniens*, a district court should ascertain if American or foreign law is applicable. If American law is applicable, then the American court should retain jurisdiction. [Citing many cases] Only when it is determined that foreign law applies is it appropriate to consider the *forum non conveniens* factors listed in *Gilbert Oil Corporaton* [sic] in determining whether to retain jurisdiction acquired over a maritime suit with foreign factors.

648 F.2d at 1017-18.[10] Under this analysis, the applicable law is to be determined using the factors presented in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). Likewise, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), places particular focus upon the contacts of the claim with the foreign forum and the injustice inherent in the retention of jurisdiction in an American court. This approach places little reliance on factors related solely to convenience, and places substantial emphasis on the contacts between the claim and a specific foreign forum.[11]

10. *See also McClelland Engineers Inc. v. Munusamy*, 784 F.2d 1313, 1316-17 (5th Cir. 1986).

11. In approving of the *forum non conveniens* dismissal in *Chiazor*, the Court of Appeals stated:

> We agree with the district court's dismissal for *forum non conveniens* [footnote omitted], for the balance is strongly in favor of the defendants and an injustice would follow had the district court retained jurisdiction. Here the district court would have had to apply (1) Nigerian law to a case (2) initiated by Nigerian plaintiffs (3) for the death of a Nigerian oil worker (4) injured off the Coast of Nigeria, (5) who received medical care in Nigeria, (6) with most of the witnesses located in Nigeria.

648 F.2d at 1020.

The maritime *forum non conveniens* rule exemplified by *Chiazor* and *Vaz Borralho*, as applied in the original federal proceeding, is a hybrid.[12] The rule is based both on this Court's decisions regarding choice of law in the maritime personal injury context, namely *Lauritzen*, *Rhoditis* and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and the adaptation of the traditional maritime and equitable notions of *forum non conveniens* to our general civil law by this Court in *Gulf Oil Corp. v. Gilbert, supra*. In *Lauritzen v. Larsen, supra*, this Court confronted the issue of whether the maritime law of this nation or the law of some other

12. The primary consideration of the maritime *forum non conveniens* analysis employed by the district court in the original federal proceeding was choice of law. This approach has been recently modified by the Fifth Circuit. *See Gonzales v. Naviera Neptuno A. A.*, 832 F.2d 876 (5th Cir. 1987) (following *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), and this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)). Although these decisions have modified the approach employed in the Fifth Circuit to maritime *forum non conveniens* to some extent, in that choice of law determinations are no longer an exclusive factor, choice of law and the balancing of national interests, remain important considerations. *Gonzales*, 832 F.2d at 879 (choice of law); *Piper*, 454 U.S. at 260, 261 (national interests). Thus, while the method of analysis to be employed in federal *forum non conveniens* cases has changed somewhat, the fundamental factors that must be considered remain the same.

Regardless of these recent developments, the dismissal of the original federal complaint became binding when petitioners failed to perfect a timely appeal. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) (*Choo I*). The federal determinations regarding convenience and choice of law cannot be altered by repleading in state court or argument of counsel in this Court.

nation should control the claim of a foreign seaman for personal injuries under the Jones Act, 46 U.S.C. § 688. In holding that the choice of law criteria to be applied in such a situation are to be arrived at "from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority," 345 U.S. at 582, this Court referred back to "a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations," 345 U.S. at 577.[13] Similarly, in *Romero v. International Terminal Operating Co., supra,* which held, *inter alia,* that the choice of law factors set out in *Lauritzen* apply equally to claims asserted under the general maritime law of

13. Elaborating on this notion, this Court went on to observe:

> . . . the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. [Footnote omitted.] It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign power by any nation, but from common consent of civilized communities of rules designed to foster amicable and workable commercial relations.
>
> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making or altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which consideration of comity, reciprocal and long range interest have developed to define the domain which each nation will claim as its own.

345 U.S. at 581-82.

the United States, this Court observed that it "must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. . . . The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled with the conduct of our foreign relations." 258 U.S. at 382-83.

In *Gulf Oil Corp. v. Gilbert, supra,* this Court held that federal courts have the inherent power to dismiss a suit arising under the diversity jurisdiction pursuant to the doctrine of *forum non conveniens.* Both Justice Jackson, writing for the majority, and Justice Black in dissent, acknowledged as a basis of the *Gulf* holding the recognized power of our admiralty courts to decline jurisdiction on the ground that the litigation is between foreigners and "can be more appropriately conducted by a foreign tribunal." 330 U.S. at 504 and 513. In establishing criteria for the exercise of the power of federal courts to decline jurisdiction in diversity cases, this Court focused on factors of private and public interest that would make trial in one court in the United States more appropriate and convenient than trial in another court. The focus of *Gulf v. Gilbert* certainly was not on "the reasons peculiar to the special problems of admiralty."[14] Nevertheless, *Gulf v. Gilbert* is cited generally as the modern source of the doctrine of *forum non*

14. 330 U.S. at 513-14 (Black, J., dissenting) (citing *Canada Malting Co. v. Paterson Steamships,* 285 U.S. 413 (1932)).

conveniens both in the diversity and maritime context. Viewed from the context of the admiralty law, *Gulf v. Gilbert* takes a concept long held necessary to the administration of the admiralty law—that admiralty, as a branch of international law, must be concerned with the accommodation and reconciliation of competing national interests—and extends it into a purely domestic American context. *See generally* Bickel, *The Doctrine of Forum Non Conveniens Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 315 (1943). Maritime *forum non convenens* existed prior to *Gulf v. Gilbert*, and it exists after *Gulf v. Gilbert*, even though it is now articulated, at least partially, in terms of the *Gulf v. Gilbert* factors.

The maritime *forum non conveniens* doctrine exemplified in the Fifth Circuit by *Chiazor* and *Vaz Borralho* and now *Gonzalez v. Naviera Neptuno, supra*, is not simply the application of the *Gilbert* convenience factors to maritime cases. As has been indicated, the maritime doctrine focuses primarily on the relative interests of the United States and other nations in the resolution of a maritime tort claim. It is concerned with the propriety of litigating a maritime tort claim of a foreign maritime worker in the courts of the United States, which is controlled by the maritime law of a country other than the United States. It does not look primarily to the convenience of the parties or the trial court, but to the appropriateness of resolving a particular maritime tort claim in the United States under the principles of accommodation and comity recognized in the intenational context by our general maritime law. The doctrine is really a rule of international abstention, preventing undue interference by our courts in the administration of the maritime law of another country when the interests of that country in the resolution of a specific maritime personal injury claim predominate over the interests of the United States.[15]

Viewed in this light, the doctrine of *forum non conveniens* that has developed regarding foreign maritime injury and death claims must be considered a substantive rule of decision under our general maritime law, distinct from the doctrine of *forum non conveniens* that is applied in cases involving disputes wholly indigenous to this country.[16] The difference is demonstrated by a consideration of the specific problem to which each rule is directed. In the context of an indigenous dispute, the problem is to determine which of two or more available forums in the United States is the most appropriate court to try the case. The problem confronted in the area of international maritime tort is to determine whether it would be appropriate to adjudicate the case in *any* court in the United States given the predominantly foreign

---

15. An analogy may easily be drawn to federal abstention under grounds of comity. *See generally Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

16. With the codification of domestic *forum non conveniens* on the federal level as a venue transfer device, 28 U.S.C. § 1404(a), it can be said that federal *forum non conveniens*, even in the diversity context, deals with the appropriateness of adjudication in the United States when a more convenient foreign forum may be available. *See In re Air Crash, supra*, 821 F.2d at 1159-60, n.15. A federal *forum non conveniens* dismissal has no efficacy if it has no preclusive effect on subsequent litigation in the United States, regardless of whether it is employed in a diversity case or a maritime case. Regardless of the source of the federal jurisdiction, policy considerations underlying both the *Erie* Doctrine (for diversity cases) and the Uniformity Doctrine (in maritime cases) and other factors may require that the *res judicata* effects of the application of the federal *forum non conveniens* rule to cases arising under state law be treated apart from maritime cases. Accordingly, Respondent directs its arguments to the considerations applicable to the rule in an admiralty context.

nature of the claim presented. One is a rule of convenience and judicial economy; the other is a rule of international accommodation and comity. Different policy considerations must underlie the application of each rule and a different *res judicata* effect must be given to decisions made under each rule. In the application of the indigenous rule, it is enough for a court to decide that it is not the appropriate court to consider the case, and leave other American courts free to determine for themselves whether they would be an appropriate forum. In the application of the international rule, however, such a practice is impossible. If, after one American court has determined that it would not be appropriate to adjudicate a claim in the United States, a second American court agrees to accept the case, the determination of the first court is completely nullified.[17] Thus, if the possibility of inconsistent results in multiple American courts is to be avoided, the international rule must be treated as one going to the substance of the adjudicative process and must preclude any reconsideration of its application, once that application has become final.[18]

17. Petitioner makes much out of the fact that a *forum non conveniens* dismissal by its nature lacks finality in that it necessarily contemplates further proceedings in another court. However, a *forum non conveniens* dismissal which contemplates further proceedings outside of the United States is a final judgment as far as the courts of this country are concerned. *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 218 (1984) (holding a *forum non conveniens* dismissal a final judgment under 28 U.S.C. § 1291). A maritime *forum non conveniens* dismissal is considered as a final judgment by the Fifth Circuit similar to a dismissal under Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 385 (5th Cir. 1983).

18. Cases of this Court in which the *forum non conveniens* dismissal were not given preclusive effect concern purely domestic situations. *See, e.g., Parsons v. Chesapeake & O. Ry. Co.*, 375 U.S. 71 (1963); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

B. A state court is required to apply the maritime *forum non conveniens* rule under the uniformity doctrine.

As was said by the Court below: "Within its sphere of operation, the maritime law of the United States is supreme; and the states are without power to disrupt it." 817 F.2d at 316. This doctrine of uniformity was firmly established in the early part of this century beginning with *Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917), where this Court held that no state "legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." In *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918), the notions of uniformity and supremacy contained in *Jensen* were extended to prevent the application of a state common law standard of liability in a maritime personal injury case in contravention of the established maritime standard. In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), this Court fashioned a maritime standard to cover injuries to ship visitors without reference to existing state common law rules. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), this Court indicated that both the substantive and procedural features of a maritime tort are controlled by federal maritime law, citing *Panama Railroad v. Johnson*, 264 U.S. 375, 376 (1924), and that federal maritime law would be controlling, even if the Petitioner were seeking to enforce a state created remedy. In similar vein, this court in *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942), held that the federal burden of

proof rule regarding contested seamen's releases for personal injury must be applied by a state court over the state's own conflicting rule. In so doing, this Court stated:

> If by its practice the state court were permitted substantially to alter the rights of either litigant, as these rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.

317 U.S. at 245. Most recently, this Court has reaffirmed the essential requirement of uniformity in maritime law in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), by holding that neither the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*, nor the Death on the High Seas Act, 46 U.S.C. § 761, *et seq.*, requires or permits the application of the Louisiana Wrongful Death Statute in a maritime death case. In discussing whether even Congress could constitutionally allow the application of state statutory remedies to maritime injuries, Justice O'Connor, writing for the majority, noted the Court long ago had ruled that "Congress could not delegate to the state the ability to proscribe rules governing maritime injuries 'that would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established.'" 477 U.S. at _____, 106 S. Ct. at 2498 (quoting *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920)). The opinion went on to hold that while state courts have

in personam jurisdiction over certain maritime actions pursuant to the "saving to suitors" clause of the Judiciary Act of 1789 (now codified at 28 U.S.C. § 1333), they are constrained to apply federal maritime law:

> The "savings to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse Erie" doctrine which requires the substantive remedies afforded by the States to conform to governing federal maritime standards.

477 U.S. at _____, 106 S. Ct. at 2495.

In this case, we face the question of whether the uniformity doctrine requires a state policy of maintaining its courts open to all litigants to give way to a conflicting federal policy of limiting the access of claimants to our maritime courts depending on the nexus of their claim with this country. While it is unclear whether the Texas Supreme Court would interpret the Texas Open Forum Statute as being mandatory rather than permissive in nature, there is more than a reasonable possibility that Texas would be of the view that its Open Forum Statute, § 71.081, Tex. Civ. Prac. & Rem. Code (Vernon 1986), mandates the acceptance of jurisdiction over any personal injury or death claim, regardless of its contact (or lack of contact) with the State of Texas. *See Couch v. Chevron International Co.*, 682 S.W.2d 534 (Tex. 1984).[19] Thus,

---

19. Relying on this Court's decision in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), Petitioner argues that as a result of the injunction entered in this case, the State of Texas has been prevented from determining the scope of its own *forum non conveniens* doctrine and accommodating any possible federal interests at issue. This argument misapprehends the issue actually raised in this case. The questions before the Court

this case presents the question of whether the maritime law's well established policy of self restraint in dealing with foreign tort claims is to prevail over conflicting policies followed by several states.[20]

---

are whether a state court is required to apply the same maritime *forum non conveniens* standard as did the federal court so that the prior federal court application of that standard to the facts of this case is *res judicata* to the state court. The question is not, as Petitioner would apparently have it, whether the federal standard is sufficiently similar to the Texas standard (if one exists) to prevent the Texas court from considering as a matter of state law the appropriateness of declining to exercise its concurrent maritime jurisdiction under the savings clause. In actuality, the application of a state's *forum non conveniens* or open forum rule is a question entirely separate and distinct from the application of the maritime *forum non conveniens* rule. The state is required under the uniformity doctrine to *first* apply the maritime rule, even if it has a well developed *forum non conveniens* rule that would achieve substantially the same result as the maritime rule. For instance, it would be entirely consistent for a state court to first apply a federal standard and determine that a maritime claim could be appropriately resolved in the United States and then apply the state standard based on considerations of convenience and decline the case because it could be more conveniently tried in another American forum. Similarly, in a jurisdiction such as Texas, the state court could conclude that under the federal standard the case was appropriate for American adjudication and then conclude that under the state's open forum statute it was required to accept the case even though a more convenient forum existed in the United States. This is not unlike the analysis applicable to a state's "long arm" jurisdiction statute of first determining whether the statute is broad enough to impose *in personam* jurisdiction under the facts of the case and then considering whether such an imposition of jurisdiction would offend the requirements of due process under the Constitution. *Compare World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) *with Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

20. Clearly, Texas is not alone in attempting to hold its courts open to the tort claimants of the world as witnessed by the policy of Texas' sister state Louisiana as evidenced in *Kassapas v. Arkon Shipping Agency, supra*. Florida also fails to recognize *forum non conveniens* when one of the parties is a resident of Florida. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

This conflict between our state and federal systems regarding international maritime claims does not exist in isolation. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964),[21] this Court held that the federal "act of state" doctrine must apply to the states. As was noted by the court below, the act of state doctrine is not dissimilar to the doctrine of *forum non conveniens. See* R. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964). In the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, Congress has asserted the supremacy of federal law in disputes between citizens of this country and the commercial enterprises carried out by foreign governments. Perhaps even more telling, Congress has amended § 688 of the Jones Act so as to exclude non-resident alien offshore oil workers from the protections afforded under American law, unless no appropriate forum is available to them. 46 U.S.C. § 688(b). Likewise, there are constitutional due process concerns that impinge on a state's ability to adjudicate claims that have little or no connection with the United States. For example, only last year, this Court, in *Asahi Metal Industry v. Superior Court of California*, ____U.S.____, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987), held that due process requirements prevented California from exercising personal jurisdiction over a Taiwanese component manufacturer in a products liability case involving automobile tires manufactured in Japan.[22]

In this context, the court below faced the issue of whether a state court was bound to apply the federal

---

21. *See also Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

22. Another consideration is the due process prohibition against an extension of state law over foreign claims in which the state has no substantial interest. *See generally Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

maritime *forum non conveniens* doctrine in a maritime injury or death case brought pursuant to the "savings to suitors" clause. The court considered four general factors to aid in the analysis necessary to determine if specific aspects of state law are *preempted*[23] by federal maritime law: (1) state law is not preempted when it contains a detailed scheme to fill a gap in maritime law; (2) state law is not preempted when the law regulates behavior in which the state has an especially strong interest; (3) maritime law preempts state law whenever a uniform rule will facilitate maritime commerce; and (4) maritime law preempts state law when the state law impinges on transnational or international relations. Applying these factors, it is clear, as the court below held, that the maritime doctrine must be followed by the states and that any state's open forum policy must yield. First, the maritime *forum non conveniens* doctrine is well developed and leaves no "gaps" to be filled by state law. Second, the interest

23. Apparently relying on the use of the term "preempted" by the court below, Petitioner invokes decisions from this Court, such as *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955), to argue that the injunction here at issue was somehow based solely on the notion that because federal law had preempted the state law in the maritime area, a state court could not entertain the case. This position seeks to ignore the real issue in this case, which is whether the prior federal dismissal worked an estoppel by judgment preventing reconsideration of the issue by the state court. The essential ingredient under the relitigation exception is a prior judgment of sufficient preclusive effect to prevent a reconsideration of the issues decided by a second court. For the prior judgment to have such preclusive effect, the case upon which it is predicated must be binding on the second court. Thus, the decision below quite properly considered whether maritime *forum non conveniens* law "preempted" state law so that the Texas court was bound to follow federal law on the point. There is no suggestion in the opinion below that a federal court is empowered to enjoin a state court's exercise of its concurrent maritime jurisdiction simply because federal maritime law has "preempted" state law.

of a state "in the substance of claims by non resident aliens arising from activities in foreign lands cannot be considered strong." 817 F.2d at 320. The third and fourth factors, however, predominate. As was observed below: "the need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry." 817 F.2d at 310. Further, "Federal law controls the international role of all courts in the United States." 817 F.2d at 321. On this basis, the court below reached the inescapable conclusion that "state court *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which federal courts would have admiralty jurisdiction." 817 F.2d at 324 (emphasis in original).

Since in this case the state is required to apply the identical legal standard to the same objective facts as was applied by the federal court in dismissing the case for further proceedings in the Republic of Singapore, the prior federal ruling has the effect of precluding the relitigation of the same issue by the state court. 817 F.2d at 324-25. The relitigation exception to the Anti-Injunction Act empowers the federal court to enjoin further state proceedings "to protect or effectuate its judgment."[24]

The correctness of Judge Gee's analysis below becomes even more apparent from a practical consideration of the various competing interests that must be accommodated by our maritime law in both the international and federal context. Maritime law is fundamentally a body of international law governing water-borne commerce between

24. *See* notes 3-5, *infra*, and accompanying text.

sovereign nations. While the admiralty and maritime jurisdiction must of necessity be plenary, it must be exercised with great sensitivity to the competing national interests with which it must deal.[25] In response, our maritime courts must be free to develop specific rules of judicial restraint, such as the *forum non conveniens* rule here at issue, as part of the mutual accommodation that must exist among maritime nations so that water-borne commercial activities can be conducted in an environment of reasonable expectations and predictability. As we in the United States expect that injuries sustained by American seamen serving aboard American ships will be dealt with in our courts according to American maritime law, (regardless of the place of the injury) and that injuries sustained by American harbor workers in American ports will be dealt with in similar fashion (regardless of the nationality of the ship upon which the injury occurs), we must always be cognizant that similar expectations are entertained by other nations with regard to their maritime workers. These expectations are not simply based on attitudes of nationalism, but also find a basis in the need for orderly administration of international maritime law. To ignore such expectations would introduce a degree of uncertainty and unpredictability into the maritime law which would be disruptive to the conduct of the commercial activities involved and, ultimately, disruptive of the ordered relations that must exist among nations. As the court below held, 817 F.2d at 321-26, and as this Court has many times pointed out,[26] the intenational role

25. *E.g., Jackson v. Steamboat Magnolia,* 61 U.S. (20 How.) 296, 298, 300-01 (1857).

26. *E.g., Zschernig v. Miller,* 389 U.S. 429, 436 (1968).

of our courts is a federal interest to be controlled by federal law.

But at the same time our system of maritime law must fit within our federal system, particularly in view of the fact that from the earliest days of our Republic, Congress has allowed the States to exercise concurrent jurisdiction in the maritime arena pursuant to the "savings to suitors" clause.[27] Thus, our system of maritime law must attempt to balance the competing state and federal interests, as well as the competing international interests. Obviously, if the states, in their exercise of concurrent jurisdiction over matters maritime, are able to ignore the accommodations reached on the federal level in the interest of international comity, the federal accommodations can be effectively nullified. To the extent that our maritime law pertains to issues of a transnational or international nature, the courts of the United States must speak with one national voice and the states' interest in administering their separate judicial systems must yield to the dominant interest of the federal government in this specialized international arena. Thus, it can be seen that a rule of judicial self-restraint, empowering our maritime courts to decline to exercise their jurisdiction in maritime cases having predominant contacts with a nation other than the United States, is fundamentally different from a rule allowing our courts to refrain from exercising their jurisdiction on the basis of factors of convenience and judicial economy in controversies where the contacts are exclusively American. This fundamental difference must be recognized, even if the two rules are articulated in similar fashion or have developed from similar sources.

27. 28 U.S.C. § 1333; *E.g., The Moses Taylor,* 71 U.S. (4 Wall.) 411 (1866). However, "[i]t is not a remedy in the common law courts which is saved, but a common law remedy." *Id.* at 431.

In this light, the categorical distinction between "substantive" and "procedural", that has proved useful in other circumstances, hinders the analytical process leading to a proper resolution of the issue presently before the Court. For the purposes of this case, it really makes no difference whether *forum non conveniens* can be denominated as "substantive" or "procedural" or whether a state recognizes a *forum non conveniens* concept in its domestic jurisprudence. The point is that our federal maritime jurisdiction recognizes and employs such a concept in its effort to accommodate our maritime law to the maritime legal systems of other nations. If that accommodation is to be effective, state courts hearing maritime cases under the savings clause cannot be allowed to interfere with the efforts of the federal courts in this regard or ignore the rules of decision employed by the maritime law to balance competing national concerns. A maritime case in which foreign concerns are dominant must be treated the same in state court as it would in federal court. At this point the uniformity doctrine must prevail.

III. The injunction below was appropriate because the *forum non conveniens* dismissal by the federal court is binding on the state court.

A state court entertaining a maritime tort claim in which non-American contacts are paramount is obliged to follow the maritime rule of *forum non conveniens* under the uniformity doctrine. It follows that a state court in such a circumstance would be bound under traditional rules of *res judicata* by a prior federal determination that the case should be dismissed for adjudication in

a foreign forum since the same rule would be applied. To allow any other course would constitute an abdictation of the overriding federal role in the administration of our maritime law and would lead to a totally unacceptable inconsistency in its application. Foreign tort claimants, having been turned away by one court, would literally be free to *shop* for another court willing to afford them a trial in this country. If such claimants are precluded from searching for a more hospitable federal court after having been told by one federal court to resolve the claim in a foreign forum, they also should be precluded from seeking the hospitality of the courts of an open forum state.

The approach taken by the Third Circuit in *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977), is most appropriate. There it was held that a second federal court was precluded from relitigating a prior federal maritime *forum non conveniens* dismissal on the basis of direct estoppel by judgment. The case concerned a ship collision between two non U.S. flagged vessels off the coast of England. The original action filed in federal district court in New York was dismissed *forum non conveniens* on the ground that England was the proper forum. This dismissal was affirmed by the Second Circuit in *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). Subsequently, actions identical to those filed in New York were filed in the federal district court for Delaware. The Delaware court dismissed on the ground that prior dismissal was *res judicata*. On appeal, the Third Circuit affirmed, stating:

> In this case the appellants point to identical objective criteria and rely on identical material facts under-

> lying the application of those criteria. Their contention amounts to no more than a wish that, in applying the objective criteria to the undisputed facts, a different judge would make the discretionary *forum non conveniens* determination [differently]. If the appellants expected the district judge in Delaware to exercise a more discrete determination than his judicial brother in the Southern District of New York, then they should have begun their litigation in Delaware. Having now finally lost in New York, they cannot relitigate the same factual and legal issues in Delaware.

565 F.2d at 854.

This Court's decisions in *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950),[28] and *Parsons v. Chesapeake & Ohio Railway*, 375 U.S. 71 (1963),[29] both deal with the concept of *forum non conveniens* as it

28. *Missouri v. Mayfield* holds that the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, does not mandate by its own terms a state's abandonment of the doctrine of *forum non conveniens*. This opinion is completely distinguishable from the case presently before the Court, since no American law, including the Jones Act (which is based upon the FELA), applied to the original federal claims as a matter of law.

29. *Parsons* presented this Court with a situation the reverse of *Chick Kam Choo*. In a *per curiam* opinion, the Court framed the issue:

> The question presented by this case is whether a federal district judge in an action brought under the Federal Employers' Liability Act is divested of all discretion to deny a Section 1404(a) transfer motion, when a suit upon the same cause of action, earlier brought in a state court in the same city, was dismissed by the state court on the grounds of *forum non conveniens*.

375 U.S. at 71. The *Parsons* Court held, as a matter of statutory construction, that the exercise of the discretionary power vested by Congress in the federal courts pursuant to 28 U.S.C. § 1404(a) to transfer the venue of cases could not be precluded by state *forum non conveniens* law. As with *Missouri v. Mayfield*, *supra*, *Parsons* was a FELA case.

applies to claims indigenous to this country and therefore are inapposite to the issue presently before the Court. When a court declines to exercise its jurisdiction in a purely domestic case relying on the convenience factors of *Gulf Oil Corp. v. Gilbert*, *supra*, or transfers the case under § 1404 of Title 28, it necessarily intends that the matter will be finally adjudicated in another American court. It serves no useful purpose to invest such a *forum non conveniens* determination with the same preclusive effect as is necessary to give substance to the *forum non conveniens* rule applicable to cases in which foreign contacts predominate. Yet the Petitioner argues that in both cases the preclusive effect should be the same and that neither should impede a second court's consideration of the case. Such an approach renders any judicial effort to determine the appropriate forum for a foreign maritime claim a meaningless academic exercise. Perhaps even more troubling is the argument's implicit frontal assault on the constitutionally dictated doctrine of uniformity in the application of the general maritime law of this country on the transnational and international level. Petitioner argues that once all federal maritime claims are dismissed, there is no longer any federal jurisdiction to be protected (Petitioner's Brief 14, n.9, *see also* JA at 96-98), presumably allowing a state court to provide state statutory and common law remedies unimpeded by the prior federal judgment.[30] This introduces the possibility of two[31] separate and independent

30. For instance, Petitioner is unclear whether the choice of law determination in the dismissal of this action by the federal court would be binding on the state court or if a second choice of law determination would be required under Sec. 71.031(c) of *Tex. Civ. Prac. & Rem. Code* (Vernon 1986).

31. Given the fact there are fifty states, at least fifty-one separate bodies of law are potentially involved.

bodies of law to govern our international maritime affairs and the possibility that different results can be obtained in the same underlying controversy by applying to either a federal or state court.[32] This possibility transcends simple notions of issue preclusion and becomes in fact an attack on the admiralty and maritime jurisdiction of the United States as it is presently understood.

The 1980 dismissal of this action by the federal court in Houston for adjudication according to the laws and in the courts of Singapore precludes the Texas state court from entertaining this action and therefore supports the permanent injunction prohibiting the further prosecution of this matter in any court in the United States under the relitigation exception of the Anti-Injunction Act.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

By: _____

JAMES PATRICK COONEY
BRIAN SCOTT DETRICK
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Counsel for Respondents

Of Counsel:
ROYSTON, RAYZOR, VICKERY & WILLIAMS

---

32. *E.g., compare Kassapas v. Arkon Shipping Agency*, 485 So. 2d 565 (La. App.), *writ denied*, 488 So. 2d 203 (La.), *cert. denied*, ____U.S.____, 107 S. Ct. 422 (1986) *with Kassapas v. Arkon Shipping Agency*, 578 F. Supp. 400 (S.D.N.Y.), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984).

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondents upon Benton Musslewhite, Esq., 609 Fannin Street, Suite 517, Houston, Texas 77002, the counsel of record for the Petitioners herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon.

This _____ day of February, 1988.

_____

JAMES PATRICK COONEY

Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

JOEL I. KLEIN
DAVID BOYD
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, TX 77002
(713) 222-2288
Counsel of Record

JOSEPH C. BLANK
1119 First Texas Building
170 Orleans Street
Beaumont, TX 77701
(409) 833-2245
Counsel for Petitioners

WILSON - EPES PRINTING CO. - INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE ANTI-INJUNCTION ACT BARS THE FEDERAL COURT INJUNCTION AGAINST HEARING THIS CASE IN TEXAS STATE COURT	2
II. NEITHER THE DOCTRINE OF *FORUM NON CONVENIENS* NOR PRINCIPLES OF FEDERAL PREEMPTION REQUIRES DISMISSAL OF THIS ADMIRALTY CASE FROM STATE COURT	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases — Page

Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955) 4
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) ..... *passim*
Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co. 394 U.S. 369 (1969) 3
Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) 7
Deakins v. Monaghan, 108 S. Ct. 523 (1988) 8
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 5
Fisher v. The Agios Nicolas V, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981) 5, 7
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 6, 7
In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc) 5
Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) 4
Piper Aircraft Corp. v. Reyno, 454 U.S. 235 (1981) 6
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 9
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 5
Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406 (5th Cir.), *rehearing en banc granted*, 828 F.2d 1 (5th Cir. 1987) 3
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 5

Statutes

28 U.S.C. § 1333 2
28 U.S.C. § 1404(a) 8
33 U.S.C. §§ 901-950 3
46 U.S.C. § 688(b) 9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-505

CHICK KAM CHOO, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

Attempting to reason from conclusion to premise, Respondent Exxon argues: (1) that federal *forum non conveniens* law preempts state law in admiralty cases; and (2) that, therefore, the federal district court in Texas, in dismissing petitioners' case on grounds of *forum non conveniens*, must necessarily also have decided that this case could not be heard in the Texas state courts. Although both legs of Exxon's argument are insupportable, only the second is properly before this Court. The fact is that the federal court's decision to dismiss Mrs. Choo's claims did not even address, let alone decide, whether federal law would prohibit Texas courts from hearing this case on grounds of *forum non conveniens*. Consequently, even if Exxon's preemption argument were correct, it must be advanced in the Texas

state courts. In view of the Anti-Injunction Act, there is simply no warrant for enjoining those courts from resolving an issue that has not previously been decided by a federal court.

Exxon's preemption argument is not only premature, however, it is also incorrect. Through the combined misuse of the doctrines of *forum non conveniens* and federal preemption, Exxon essentially argues that maritime cases involving the application of foreign law may not be heard in any court in this country despite the fact that admiralty jurisdiction over such cases has been granted to both the federal and the state courts. *See* 28 U.S.C. § 1333. Even assuming that the policy considerations proffered in support of such an approach had any merit, the argument should be made to the Congress, and not to this Court. Congress, after all, conferred the admiralty jurisdiction in question. It alone should be allowed to decide whether to take it away.

I. THE ANTI-INJUNCTION ACT BARS THE FEDERAL COURT INJUNCTION AGAINST HEARING THIS CASE IN TEXAS STATE COURT.

Even assuming that Respondents' mistaken interpretations of maritime law and *forum non conveniens* principles were correct, the fact remains that now is not the appropriate occasion for this Court to consider them. The Anti-Injunction Act as well as paramount concerns of federalism and comity dictate that the Texas courts be afforded the opportunity to address the considerations that Exxon raises, along with other potentially relevant considerations, including the policies implicated by that State's open forum statute. As Exxon acknowledges, it is not clear how the Texas courts will decide the issue. Respondents' Br. at 29. Whatever the prognossi, however, on the facts of this case the Anti-Injunction Act prohibits the lower federal courts from enjoining the Texas courts' consideration of either federal law or its own law in the first instance. If the Texas courts err in

resolving the issues, only then would it become the responsibility of this Court to correct them.

This Court's decision in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), makes these essential points with unmistakable clarity. In that case, much like in this one, an injunction of a state court proceeding was supported by the claim that, in initially deciding a federal law issue, the district court must also necessarily have decided that federal law preempted state law in the area. After examining the initial district court opinion with care, however, this Court concluded that the argument simply could not be supported because the initial judgment resolved only the federal law issue, and not the preemption issue. It made no difference in this regard that the Court itself, subsequent to the initial district court decision, had ruled that federal law does in fact preempt state law in the area in question. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). This consideration notwithstanding, the Court held, all that could be protected by an injunction were those issues that were actually resolved by the federal court, and not those that might have been decided.[1]

---

[1] *See also Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir.), *rehearing en banc granted*, 828 F.2d 1 (5th Cir. 1987). There, a claim under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"), was processed and finally adjudicated and the claimant awarded benefits. In the meantime, the claimant had filed suit in state court alleging bad faith under state law against the LHWCA insurance carrier concerning the manner in which such carrier had handled the LHWCA claim. The federal district court granted an injunction against the state court action, primarily on the ground that the LHWCA preempted the state court bad faith remedy and, because it did, the LHWCA final claim adjudication was res judicata of the state court action and thus justified an injunction under the "relitigation" exception to the Anti-Injunction Act. In reversing that portion of the district court's holding, the panel stated that the issue of state law bad faith was not before the administrative law judge, just as the

In the instant case, Respondents do not contend, nor could they, that the initial federal court ruling dismissing Mrs. Choo's claims actually decided either that federal law preempts state law on questions of *forum non conveniens* in admiralty cases, or that under Texas law this case could not be heard in state court. On the contrary, as we demonstrated in our opening brief (pp. 3-4, 16), those issues were never raised or addressed in the initial federal court proceedings. It was only after the injunction subsequently issued that the preemption issue was first raised. But that post-hoc rationalization cannot support an injunction intended to protect an earlier judgment that never reached the issue.

The purpose of the Anti-Injunction Act is to protect the separate sphere of state power that is the keystone of federalism. When state courts are presented with issues of federal law, they are fully competent to determine those issues, and no federal injunction can be justified out of fear that the state court will err. *Pennzoil v. Texaco*, 107 S. Ct. 1519 (1987); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955). Accordingly, the federal courts below did not have the authority to enjoin the Texas courts from considering the preemptive effect of the prior federal determination "merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law or federal procedures." *Atlantic Coast*

---

issue of state law *forum non conveniens* was not before the initial district court in the case at bar. Citing *Atlantic Coast Line*, *supra*, the panel then reversed the grant of the injunction. It held that, even though the LHWCA did preempt the state court action, "[p]reemption is not equal to res judicata" and that:

> We recognize that a finding of preemption coupled with an inability to coercively enforce that finding is paradoxical, to say the least. Nevertheless, it is only emblematic of the prized value we have historically place[d] on the principles of federalism and comity.

820 F.2d at 1416, 1417.

Line, 398 U.S. at 297-98 (Brennan, J., dissenting); *see also id.* at 294 (majority opinion); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (plurality opinion). Because the injunction was no more than an affront to the abilities of the Texas courts to decide these issues in the first instance, reversal is compelled. *Atlantic Coast Line*, 398 U.S. at 296; *see also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

II. NEITHER THE DOCTRINE OF *FORUM NON CONVENIENS* NOR PRINCIPLES OF FEDERAL PREEMPTION REQUIRES DISMISSAL OF THIS ADMIRALTY CASE FROM STATE COURT.

Exxon devotes most of its brief to arguing that federal principles of *forum non conveniens* preempt state law in admiralty cases. As we have indicated above, in this case that argument must be made to the Texas courts before it may be reviewed by this Court. Exxon's argument is not only addressed to the wrong forum, however. It is also incorrect on the merits.

As we understand it, Exxon's position appears to rest on two essential predicates. First, it suggests that the federal law governing *forum non conveniens* requires dismissal of an admiralty case like this one because the district court initially found that Mrs. Choo's claims were not governed by the general maritime law of the United States.[2] Second, it argues that the state courts

---

[2] We should note as a preliminary matter that the logic that leads Exxon to this position is flawed. Exxon's premise is derived from Fifth Circuit case law, now explicitly overturned, *see In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc), that a court may not dismiss a case on *forum non conveniens* grounds if American law, not foreign law, applies. *See generally Fisher v. The Agios Nicolas V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981). Exxon's conclusion turns this case law on its head, arguing that a court must dismiss a case when foreign law is found to apply. *See* page 7 *infra*.

are bound to follow this federal *forum non conveniens* rule under the "uniformity doctrine." Taken together, these two assertions would effectively remove a whole class of admiralty cases from the federal and state courts alike, even though Congress specifically conferred such jurisdiction in the first place. Not surprisingly, this argument for judicial nullification of congressionally-conferred jurisdiction is unpersuasive.

As we explained in our opening brief (pp. 30-35), because the doctrine of *forum non conveniens* is based in part on "considerations affecting the court's own administrative and legal problems," *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235, 251 (1981), state courts should be free to apply their own *forum non conveniens* standards in admiralty cases so that they can properly accommodate their own institutional interests, along with any pertinent federal law concerns as well as the concerns of the parties. Exxon's argument to the contrary rests on the assertion that there is a need for uniformity in admiralty cases and on the assumption that a preemptive federal rule will lead to such uniformity, thereby providing that cases such as Mrs. Choo's could not be heard in any court in this country. The argument is flawed from its inception because it is predicated on a basic misunderstanding of the nature of federal *forum non conveniens* law.

Federal law governing *forum non conveniens* determinations in cases involving foreign claimants—much like in other cases—remains at bottom a discretionary doctrine. As this Court put it in *Piper Aircraft v. Reyno*, 454 U.S. at 257, a "*forum non conveniens* determination is committed to the sound discretion of the trial court." *See also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Such a discretionary determination, by definition, contemplates that different courts may well reach different conclusions in substantially similar circumstances. That, of course, is the fundamental difference between a discretionary doctrine and a mandatory rule of law. In view of this recognition, a requirement that state courts apply federal *forum non conveniens* principles in admiralty cases simply will not lead to the uniformity of outcomes that Exxon would insist upon.

Although Exxon attempts to convey a contrary impression, the cases it relies on fully support our view. Thus, Exxon asserts that "the development that has taken place in the Fifth Circuit is most relevant to the case at hand." Respondents' Br. at 19. But the Fifth Circuit standard that Exxon specifically relies on makes plain that, even when a federal court determines that foreign law governs a claim, it still has discretion "to retain jurisdiction acquired over a maritime suit with foreign factors." *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1018 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), *quoted* in Respondents' Br. at 20.[3] Thus, even if a state court were required to apply this federal standard to *forum non conveniens* motions, it would still be permitted to hear an admiralty case like the instant one. *See also Fisher v. The Agios Nicolos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981). Accordingly, Exxon's quest for a uniform federal rule mandating dismissal of certain kinds of admiralty cases ultimately proves illusory since the *forum non conveniens* doctrine that it relies on simply will not support such a result.

Perhaps aware of this problem, Exxon appears to go further by suggesting that federal *forum non conveniens* law should, in fact, be interpreted to require that admiralty cases such as Mrs. Choo's may not be heard in any court in this country. Such a rule is appropriate, according to Exxon, "when maritime law impinges on transnational or international relations," Respondents'

[3] As *Chiazor's* reliance on *Gilbert*, *supra*, indicates, 648 F.2d at 1019, Exxon is mistaken when it asserts that the Fifth Circuit's approach "places little reliance on factors related solely to convenience." Respondents' Br. at 20.

Br. at 9, and thus implicates "the principles of accommodation and comity recognized in the international context by our general maritime law." *Id.* at 24.[4] In our view, this argument—which would, in effect, eliminate a portion of the admiralty jurisdiction granted to the federal and state courts—should be addressed to Congress, and not to this Court.[5]

We note initially that, while the purported rationale for Exxon's approach has to do with "international relations," neither the United States nor any foreign country has sought to file an amicus brief in this case. Rather, it is Exxon, joined by several other U.S. companies as *amicus curiae*, that puts forward these concerns. But these companies are all litigants that have a direct and personal interest in fashioning a rule that will allow them to escape jurisdiction in this country for maritime torts that they commit overseas. Such parties hardly seem to be a likely source from which to accurately determine true international and transnational interests.

More significantly, the assessment of these kinds of interests is uniquely within the authority of Congress, which is obviously best situated to weigh the validity of

[4] Every federal court *forum non conveniens* claim necessarily implicates international or transnational concerns. A court may properly consider such a dismissal only when such factors are present, regardless of whether the case arises under maritime law. Issues of inconvenience germaine to purely domestic cases cannot lead to a *forum non conveniens* dismissal, but rather to a transfer under 28 U.S.C. § 1404(a).

[5] Exxon's effort to analogize its proposal "to federal abstention under grounds of comity," Respondents' Br. at 25 n.15, is unpersuasive. The traditional abstention doctrine is designed to allow a federal court to defer action while awaiting the outcome of relevant state court proceedings. *Deakins v. Monaghan*, 108 S. Ct. 523 (1988). After the state courts act, however, the federal court may then properly exercise its jurisdiction. The rule that Exxon proposes, however, involves a dismissal of certain admiralty cases, never to return to any court in this country.

the concerns proffered by Exxon and to balance them against potentially countervailing concerns about the need to keep the courts of this country open to foreign claimants. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360 (1959). This recognition is especially compelling in the instant situation since it is Congress that conferred admiralty jurisdiction—in both federal and state court—in a case like Mrs. Choo's. If there is good and sufficient reason to eliminate such cases from the admiralty jurisdiction, Congress is doubtless capable of doing so, as recent experience in a related context indicates. *See* 46 U.S.C. § 688(b). But it would be both unwise and inappropriate for this Court, through the invocation of the *forum non conveniens* doctrine in a certain class of admiralty cases, to eliminate congressionally-conferred jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOEL I. KLEIN
DAVID BOYD
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, TX 77002
(713) 222-2288
Counsel of Record

JOSEPH C. BLANK
1119 First Texas Building
470 Orleans Street
Beaumont, TX 77701
(409) 833-2245
Counsel for Petitioners

Supreme Court, U.S.
FILED
FEB 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,

Petitioners,

VS.

EXXON CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE

EUGENE J. SILVA*
JOHN M. MACIEJCZYK
VINSON & ELKINS
First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2014

Attorneys for Amici Curiae,

International Association of Drilling Contractors and Offshore Marine Service Association

Petition for Writ of Certiorari filed September 21, 1987
Certiorari Granted November 16, 1987

**Counsel of Record*

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Certification of Consent	1
Identification of Supported Party	1
Interest of Amici Curiae	1
Summary of Argument	2
Argument	3
I. REVERSING THE LOWER COURT'S RULING ON THE BASES ASSERTED BY PETITIONERS COULD HAVE A DRAMATIC, ADVERSE IMPACT UPON FUTURE STATE COURT APPLICATION OF 46 U.S.C. § 688(b) IN SIMILAR ACTIONS	3
II. REVERSING THE COURT OF APPEALS DECISION WOULD FRUSTRATE THE WILL OF CONGRESS AS EXPRESSED IN § 688(b)	7
III. THE PROCEDURAL VERSUS SUBSTANTIVE ARGUMENT URGED BY PETITIONERS IS A FALSE DICHOTOMY RELIED UPON TO OBTAIN A DIFFERENT RESULT IN STATE COURT	13
Conclusion	16
Certificate of Service	17

TABLE OF AUTHORITIES

Page

CASES

American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) 8
Burnet v. Brooks, 288 U.S. 378 (1933) 11
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 13,14
Fong Yue Ting v. United States, 149 U.S. 698 (1893) 11
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 8
Guaranty Trust v. York, 326 U.S. 99 (1945) 13,14
Hanna v. Plumer, 380 U.S. 460 (1965) 13
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) .. 8
Lindgren v. United States, 281 U.S. 38 (1930) 9
The Lottawana, 88 U.S. (21 Wall.) 558 (1874) 8,9
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 8
Offshore Logistics, Inc. v. Tallentire, ... U.S. ...., 106 S.Ct. 2485 (1986) 5
Perez v. Brownell, 356 U.S. 44 (1958) 11
United States v. Pink, 315 U.S. 203 (1942) 11

STATUTES

28 U.S.C. § 1333 (1982) 3,5
46 U.S.C. § 688(b) (1982) ..... *passim*

LEGISLATIVE MATERIALS

Act of December 29, 1982, Pub. L. No. 97-389, Title V, § 503, 96 Stat. 1949, 1955-56 (codified at 46 U.S.C. § 688(b) (1982)) ..... *passim*
Maritime Torts: Hearings on H.R. 4863 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 97th Cong. 2d Sess. 74-77, 82-83 (1982) 6,7,10,11,12,14
H.R. REP. No. 863, 97th Cong., 2d Sess. (1982) 6,9,10,12,14
The Merchant Marine Act of 1920, 41 Stat. 1007 (codified as amended at 46 U.S.C. § 688 (1982)) 2

No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, *et al.*,
Petitioners,

vs.

EXXON CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICI CURIAE

CERTIFICATION OF CONSENT

This brief is filed with permission of the parties under S. CT. R. 36.2. The required letters of consent have been filed with the Clerk of this Court.

IDENTIFICATION OF SUPPORTED PARTY

Amici herein file this brief in support of the Respondents.

INTEREST OF AMICI CURIAE

The International Association of Drilling Contractors ("IADC") is an organization of approximately 560 oil and gas

drilling contractors throughout the world. Headquartered in Houston, Texas, the Association is comprised of members from 32 foreign countries who employ thousands of workers, of almost every nationality, to conduct oil and gas drilling operations. The Offshore Marine Service Association ("OMSA") represents the interests of vessel owners and operators providing vessel support and transportation services to all phases of the offshore energy industry. OMSA has over 100 member corporations located on all coasts of the United States, operating over 2,000 American flag vessels.

The IADC and OMSA are interested in this litigation because of the potential adverse effect this Court's ruling could have on their members who employ non-Americans as "seamen" aboard vessels engaged in the exploration, development and production of offshore mineral or energy resources. A decision to reverse the United States Court of Appeals for the Fifth Circuit could eviscerate the effect of a recently enacted federal statute directly on point. This statute, section 688(b) of the Jones Act, was passed by Congress to protect American offshore drilling contractors and support organizations from the adverse effect of lawsuits instituted by foreign offshore oil workers in the courts of the United States.

SUMMARY OF ARGUMENT

On December 29, 1982, Congress enacted Public Law 97-389. Title V of that legislation contained a revision to section 20 of the Merchant Marine Act of 1920, 41 Stat. 1007 (the "Jones Act") (codified as amended at 46 U.S.C. § 688 (1982)). Section 688 was amended to add subsection (b)(1) which essentially provided that a foreign seaman may not maintain an action for injury or death in an American court under the maritime laws of this nation if the injury occurred while that seaman was working in the offshore oil industry, within the territorial waters of a nation other than the United States. 46 U.S.C. § 688(b)(1).

The amendment also provided that section 688(b) would not affect actions arising before its enactment date. Therefore,

section 688(b) is not directly at issue in this appeal. However, there is a clear danger that a ruling by this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit could undercut Congress' intent in passing section 688(b).

Petitioners argue that the *forum non conveniens* ruling by the district court should not be binding on Texas state courts because it is merely a procedural, not a substantive, decision. If this Court reverses on that basis, the same argument could be made that section 688(b) is merely a codification of federal procedural law, and is therefore not binding on state courts that are otherwise required to follow the mandates of federal maritime law when entertaining suits brought by seamen under the "saving to suitors" clause of 28 U.S.C. § 1333 (1982).

When it enacted section 688(b), Congress specifically considered both the uniformity requirements of the general maritime law and the impact of the provision on foreign relations. It was clearly exercising its prerogative to legislate in these purely federal arenas. This Court should look to the guidance of Congress in enacting section 688(b) when deciding this appeal. The decision of the Court of Appeals should be upheld in order to preserve, and not undercut, the intent of Congress as manifested in its passage of section 688(b).

ARGUMENT

I.

REVERSING THE LOWER COURT'S RULING ON THE BASIS ASSERTED BY PETITIONERS COULD HAVE A DRAMATIC, ADVERSE IMPACT UPON FUTURE STATE COURT APPLICATION OF 46 U.S.C. § 688(b) IN SIMILAR ACTIONS

On December 29, 1982, Congress enacted the following amendment to the original section 20 of the Jones Act:

> (b) Limitation for certain aliens; applicability in lieu of other remedies
>
> (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the

United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. . . .

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Act of December 29, 1982, (hereinafter "the Act") Pub. L. No. 97-389, Title V, § 503(a), 96 Stat. 1949, 1955 (1982) (codified at 46 U.S.C. § 688(b)(1982)).

The Act also specified that "[t]he amendment made by this section . . . does not apply to any action arising out of an incident that occurred before the date of enactment of this section [Dec. 29, 1982]." *Id.* § 503(b). Because Petitioner's decedent, Leong Chong, died in 1977, prior to the effective date of section 688(b), this provision does not control the outcome of this appeal. However, there is a high risk that a reversal of

the Fifth Circuit's decision on the basis urged by Petitioners, could have a dramatic, negative impact on the application of section 688(b) in the future.

Under this Court's holding in a series of cases, the most recent of which is *Offshore Logistics, Inc. v. Tallentire*, ... U.S. ....., 106 S.Ct. 2485 (1986), state courts entertaining maritime actions under the "saving to suitors" clause of 28 U.S.C. § 1333 (1982), are constrained by the "so called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing maritime standards." *Id.* at 2495. Although the Fifth Circuit did not directly address this procedure/substance dichotomy below, implicit in its decision is the notion that a *forum non conveniens* dismissal, at least in a maritime setting, is substantive. *See Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 324 (5th Cir. 1987) (rejecting a Louisiana State Court of Appeals decision that *forum non conveniens* is "procedural").

Petitioners argue that the Court of Appeals erred, and that a forum non conveniens dismissal is "procedural" in nature:

> Although Judge Gee properly recognized . . . this Court's holding in [*Tallentire*] he mistakenly applied that principle to the procedural concerns implicated by the *forum non conveniens* doctrine. This reflects a substantial error of analysis; the procedural interests of the adjudicating forum are at root in the substantive/procedural law distinction in both the *Erie* and reverse-*Erie* context. Thus, even when a particular body of substantive law must govern a cause of action, the forum applying that substantive law is fully entitled to use its own procedural rules, including local principles of *forum non conveniens*.

Br. for Petitioners at 34-35.

Should this Court agree with Petitioners that *forum non conveniens* is purely a procedural matter, and therefore under *Tallentire* not binding on state courts under the reverse-*Erie* doctrine, this holding could be used by litigants in subsequent state court actions to eviscerate the effect of section 688(b).

Section 688(b) is a codification of congressional policy in the application of federal general maritime *forum non con-*

veniens principles to foreign offshore workers. There are numerous references in the legislative history of the enacting legislation to traditional choice of law/*forum non conveniens* factors. For example, the House report on the Act states:

> [Section 688(b)] will establish a jurisdictional rule .... The worker in the offshore petroleum industry is not engaged in a maritime activity that takes him into waters controlled by a number of different nations or no nation. Rather, he is involved in an activity under the clear jurisdiction of one nation. In light of this relationship, the place of injury is an appropriate forum in which to seek redress. The rationale underlying the application of "the law of the flag" to maritime workers does not exist for foreign offshore energy production workers whose activities are closely related to land-based petroleum technology and are not of a true maritime nature.
>
> ... Trial at the place of injury will ensure greater ease of access to sources of proof, proximity of potential witnesses, and ability to join additional parties who are not subject to suit in the U.S. The Bill should discourage forum shopping and decrease U.S. court expenses and backlogs.

H.R. REP. No. 863, 97th Cong., 2d Sess. at 4 (1982). The report also emphasized that foreign workers affected by the Act are not without remedies in another forum:

> Based on three days of hearings, it is clear that the nations granting offshore oil or mineral exploration rights have procedures to compensate a worker injured in an offshore operation. Those nations not having such procedures can establish programs and require U.S. companies operating off their coast to participate in those programs.
>
> Though it seems unlikely that a foreign worker would not have a remedy available in either his home nation or the nation exercising jurisdiction over the place of injury, the legislation provides that if this should occur, the worker would not be prevented by this Act from bringing a Jones Act suit in the United States.

H.R. REP. 97-863, *supra* at 5-6. *See also, e.g., Maritime Torts: Hearings on H.R. 4863 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 97th Cong. 2d Sess. 74-77, 82-83 (1982).

Indeed, the Court of Appeals noted below that section 688(b) codified federal *forum non conveniens* law:

> The legislative history [of section 688(b)] makes it clear that Congress intended to codify judicial decisions dismissing claims under the Jones Act by foreign offshore workers under the doctrine of *forum non conveniens.*

817 F.2d at 323.

Therefore, the same arguments Petitioners make in this action concerning a *forum non conveniens* dismissal could easily be made in future cases with regard to section 688(b).

It should be noted that Counsel for Petitioners in this appeal opposed the passage of section 688(b), and undoubtedly see this case as a vehicle to undermine its effect. *Hearings, supra* at 112-48 (testimony of B. Musslewhite). The legislative history also contains a reprint of an article in the St. John's, Newfoundland, *St. John's Evening Telegram* that quoted counsel for Petitioners as saying the bill was "chauvinistic and racist and constitutes the rankest discrimination against non-American offshore workers," and urging all Canadians to oppose the legislation. *Hearings, supra* at 198.

II.

REVERSING THE COURT OF APPEALS DECISION WOULD FRUSTRATE THE WILL OF CONGRESS AS EXPRESSED IN SECTION 688(b)

Section 688(b) is a carefully considered modification of American tort law principles as applied in the general maritime law. Congress considered, in depth, both the necessity for uniformity of the general maritime law, and the impact of section 688(b) on relations with our foreign trading partners. There is also evidence that Congress considered it was passing a "substantive" measure. For these reasons, this Court should

look to the policy bases underlying the enactment of section 688(b) for guidance when deciding the instant case, particularly in light of the possible impact its decision will have on the effectiveness of section 688(b) as interpreted by state and federal courts in future cases.

1. Uniformity

The need for uniformity has from our nation's beginning been the express policy underpinning the requirement that federal law be the rule of decision in maritime cases. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 516 (1828). This underlying principal continues today as the central premise of federal maritime law. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154-55 (1964); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958). In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), stressing the need for uniformity and Congress' role in the formulation of federal maritime law, Justice McReynolds wrote:

> [W]e accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Id. at 160. This echoed the words Justice Bradley wrote a half-century earlier:

> [T]he Constitution must have referred to a system of [admiralty and maritime] law co-extensive with and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

The Lottawana, 88 U.S. (21 Wall.) 558, 575 (1874).

Congress has legislated to preserve adequate harmony and promote uniform rules relating to maritime matters with a vengeance, addressing in one form or another subjects as diverse as navigation rules, pollution regulations, dredging and filling operations, the boundaries of coastal states' territorial waters, and remedies for injured longshore and harbor workers, to name but a few efforts. In the Jones Act, Congress provided the exclusive remedy for seamen injured while in the service of their vessel. This Court has held that the Jones Act was "intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Lindgren v. United States*, 281 U.S. 38, 44 (1930).

In 1982, Congress again exercised its power to uniformly administer the substantive federal maritime law, specifically addressing the right of foreign nationals to bring suits under the Jones Act and the general maritime law. The legislative history of section 688(b) clearly reflects Congressional concern for the disparities in *forum non conveniens* decisions rendered by state and federal courts. Section 688(b) was enacted to remedy these discrepancies. In the House Report, the Committee on Merchant Marine and Fisheries commented on the injustice of this lack of uniformity:

> In recent years, a number of our courts have entertained suits under the Jones Act by foreign offshore workers injured while working above the Outer Continental Shelf of a foreign nation. This approach has not been accepted by all Federal Courts, however. As a result, the determination as to whether it is appropriate to commence a suit in the United States depends not on the statutory right granted by the Jones Act but rather on the happenstance of where the suit is instituted or which district judge

hears the case. *The Committee finds that this lack of uniform treatment is unjustified and unreasonable.*

H. R. REP. No. 97-863, *supra* at 3 (emphasis added). Sponsors and supporters of the Act repeatedly referred to the need for uniformity in the general maritime law during both the hearings and floor debates on section 688(b). *See, e.g., Hearings, supra* at 1 ("This legislation seeks to establish uniform jurisdictional rules to guide the courts in their consideration of these actions."), 95-97 (discussing disparity between Texas federal district court *forum non conveniens* rulings), 168 ("Another example of the confusion is the information given this Subcommittee on February 25 about the history of a lawsuit dismissed by one Federal District Court on grounds of *forum non conveniens* being refiled in an adjoining Federal District. [Section 688(b)] would end the existing uneven treatment.") (statement of Rep. Shumway); 128 CONG. REC. at H-7632 (daily ed. Sept. 28, 1982) (statement of Rep. Snyder) ("[T]here has been an uncertain and confusing case law development regarding the offshore industry. [Section 688(b)] is an attempt to establish a uniform approach to considering suits brought by foreign workers ...."), H-7634 (statement of Rep. Hubbard), H-7638 (statement of Rep. Derwinski), H-9453 (daily ed. Dec. 10, 1982) (statement of Rep. Pritchard).

In opening the second day of hearings on the Act, the Merchant Marine Subcommittee Chairman stated that:

> The Jones Act rights of seamen have been extended by some courts to permit suits in U.S. courts by foreign offshore workers. At the February 25 hearing, testimony was presented indicating that the courts have failed to develop a uniform approach in dealing with litigation seeking Jones Act remedies for offshore workers. Sometimes the courts will dismiss these actions on the basis of *forum non conveniens*. In other instances, the courts will entertain the suits. [Section 688(b)] will establish a consistent approach to dealing with cases involving persons engaged in offshore resource recovery.

Hearings, supra at 165 (May 19, 1982).

Section 688(b) was therefore a carefully considered effort by Congress to inject some uniformity into the *forum non conveniens* decisions of federal and state courts. It is a clear expression by Congress of what maritime law should be and how the courts should treat cases brought by foreign offshore workers in this country. This Court should be reluctant to undercut that policy by giving credence to Petitioners' arguments.

2. Foreign Policy

As with maritime matters, the federal government also exercises nearly exclusive control over foreign relations. In fact, this Court has said the area is the sole province of the federal government, where no state may interfere: "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). This power derives from, and is considered by this Court to be, an inherent attribute of sovereignty. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1983); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933).

Congress has a well recognized role in foreign policy. As Justice Felix Frankfurter, writing for this Court in *Perez v. Brownell*, 356 U.S. 44, 57 (1958), stated:

> Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation ... a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations.

In fact, Petitioners themselves recognize that "foreign policy is not a matter set by the judiciary but by the elected representatives of the government." Br. for Petitioners at 36. This is indeed the case, and section 688(b) reflects Congress' policy decision on this issue. As with Congress' concern with

the need for uniformity in the general maritime law, it also carefully considered the impact of section 688(b) on foreign relations. The Committee's report emphasized the sovereignty concerns deemed crucial to foreign relations in *Fong Yue Ting* and *Burnet*:

> The legislation is in accord with customary international law and international agreements in that it recognizes the right of a nation to regulate activity within its territorial waters and in the Outer Continental Shelf adjacent to the coast of that nation. *The present situation whereby domestic United States law is applied to actions and occurrences within the jurisdiction of a sovereign foreign nation is an unwanted application and extraterritorial extension of U.S. law and not in accord with our treaties of friendship and navigation.*

H. R. REP. 97-863, *supra* at 7 (emphasis added).

The remarks of the Chairman of the Subcommittee on Merchant Marine also reflected a concern for the foreign relations impact of section 688(b):

> [Section 688(b)] is based on the axiom of international law that each nation has a right to control activities occurring within its territory. The Outer Continental Shelf Lands Act and a number of multinational treaties recognize the right of a country to establish laws and regulations governing offshore exploration and development on the continental shelf adjacent to that country. The pending legislation establishes that Jones Act suits should not be entertained where a system of compensation has been established by either the nation regulating the offshore activity or the home nation of the injured party.

Hearings, supra at 165-66. *See also Hearings, supra* at 2 ("[Section 688(b)] recognizes that other nations have established rules to govern offshore exploration, production, and development in water under their jurisdiction, *and directs that those laws and regulations should preempt the system of compensation set up by our Nation in the case of foreign citizens.*") (emphasis added).

Congress clearly exercised its law-making prerogative in foreign relations when enacting section 688(b). As Petitioners

argue, courts should look to it for guidance in this area. By enacting section 688(b), Congress made a strong statement that these *forum non conveniens* decisions have a definite foreign relations impact, and it expressed its will as to their proper resolution. This Court should be reluctant to undercut the effect of that statute.

III.

THE PROCEDURAL VERSUS SUBSTANTIVE ARGUMENT URGED BY PETITIONERS IS A FALSE DICHOTOMY RELIED UPON TO OBTAIN A DIFFERENT RESULT IN STATE COURT

Petitioners rely on a "procedure" versus "substance" dichotomy to avoid the district court *forum non conveniens* dismissal. *See* Br. for Petitioners at 34. However, this Court long ago commented on the weakness of such a distinction:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Guaranty Trust v. York, 326 U.S. 99, 108 (1945). *See also Hanna v. Plumer*, 380 U.S. 460, 469-73 (1965) (reaffirming the distinction between "substance" and "procedure" is inadequate). In fact, this Court has indicated that any test, including the "outcome-determinative test" is inappropriate: "[C]hoices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." 380 U.S. at 467.

The policies underlying the *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) rule are two-fold; "discouragement of forum shopping and avoidance of inequitable administration of the

laws." *Id.* at 468. An examination of the legislative history of section 688(b) shows that the first of these policy considerations, forum shopping, seems to have been a dominant consideration in its passage. *See, e.g.*, H.R. REP. 97-863, *supra* at 4; *Hearings, supra* at 30, 32-33, 197-200.

The second *Erie* consideration, "inequitable administration of the laws," has also been strongly emphasized by this Court. As noted in *Guaranty Trust,* "the intent of [*Erie*] was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same .... *The nub of the policy ... is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.*" 326 U.S. at 109 (emphasis added).

Of course, the same policy is at work in this instance. Petitioners seek to hang the false epithet of "procedure" on a *forum non conveniens* decision so that they may obtain a different result in a state court a few blocks away. This amounts to a violation of the Congressionally mandated interest in uniform application of the general maritime law.

The legislative history of section 688(b) also demonstrates that Congress considered *forum non conveniens* a substantive matter. When discussing U.S. treaty obligations, Congress noted that provisions in treaties granting foreign nationals "access" to the courts of the United States do not define substantive rights:

> The courts have generally found that the substantive rights granted by the Jones Act do not extend to foreign nationals who lack sufficient contacts with the United States. ... [Section 688(b)] codifies this case law and clarifies that the substantive rights granted by the Jones Act do not extend to foreign offshore workers.

H. R. REP. 97-863, *supra* at 7.

Therefore, while Petitioners assert the "procedure" versus "substance" argument here to avoid the effect of a federal court

decision, this Court has determined that these labels are not significant. What is significant are the policies underlying the *Erie* and reverse-*Erie* doctrines. These policies, the discouragement of forum shopping and avoidance of inequitable administration of laws, were both factors that Congress considered in passing a statute to deal with the exact situation presented in this appeal. This Court should not overlook the policy considerations, and the valuable guidance provided by Congress in passing section 688(b).

CONCLUSION

Although it does not control the outcome of this litigation, there is a very real danger that a reversal by this Court of the Fifth Circuit's ruling on the basis of arguments presented by Petitioners could undercut the effectiveness of section 688(b). Petitioners' theory that a federal court *forum non conveniens* dismissal is merely procedural and therefore not binding on state courts under the reverse-*Erie* doctrine could easily be applied to avoid the effect of section 688(b) in future state court cases. If this Court reverses the Fifth Circuit on that basis, plaintiffs might be able to avoid the prohibitions of section 688(b) by simply walking down the street to a state court, in direct violation of Congressional intent. In enacting section 688(b), Congress exercised its plenary authority over the general maritime law and foreign relations. Although not bound by the enactment in this particular case, this Court should look to section 688(b) as an expression of Congressional policy in this purely Federal arena. The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

By _____
Eugene J. Silva
John M. Maciejczyk
2506 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2014

Attorneys for Amici Curiae

OF COUNSEL:

VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713/651-2222

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the above and foregoing brief by mailing them by certified mail, return receipt requested to Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002 and to James Patrick Cooney, Royston, Rayzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002.

_____
Eugene J. Silva

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-505

In the Supreme Court

OF THE

United States

OCTOBER TERM 1988

CHICK KAM CHOO, et al.,
Petitioners,

VS.

EXXON CORPORATION, et al.,
Respondents.

On Appeal from the United States Court of Appeal for the Fifth Circuit

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE.

JOHN C. MCHOSE
Counsel of Record
725 S. Figueroa Street
Los Angeles, CA 90017
(213) 488-7100

RICHARD W. PALMER
Public Ledger Building
Independence Square
Philadelphia, PA 10106
(215) 625-9900

MICHAEL MARKS COHEN
One Battery Park Plaza
New York, New York 10004
(212) 422-7585

LILLICK MCHOSE & CHARLES
PALMER BIEZUP & HENDERSON
BURLINGHAM UNDERWOOD & LORD
Of Counsel

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I	
THE DECISION SHOULD BE BASED ON THE PRINCIPLE OF UNIFORMITY OF MARITIME LAW	5
A. The Founding Fathers Agreed Maritime Law, Controlled by the Federal Government and Supreme Court, Should be Uniform in all Courts in the United States	5
B. The Intent to Maintain National Uniformity was Confirmed in the Constitution	7
C. Although Congress has Delegated a Portion of Admiralty Law Jurisdiction to the State Courts, They are Required to Apply Federal Admiralty Law	8
D. Calling the Dismissal "Procedural" Does not Resolve the Case	9
II	
UNIFORMITY REQUIRES THAT IN MARITIME CASES SOME FEDERAL DOOR-CLOSING MEASURES BIND THE STATE COURTS LIKE THE ONE INVOLVED HERE	11
A. Maritime Remedies	12
B. Foreign Forum Clauses	12

	Page
C. Arbitration	13
D. Sovereign Immunity	13
E. Acts of State Doctrine	14
F. Insufficient Contacts With the Forum	14
G. Forum Non Conveniens	14
III	
CONFLICT AND UNCERTAINTY CONCERNING CONDITIONAL DISMISSAL ON THE GROUND OF FORUM NON CONVENIENS IN MARITIME CASES IN UNITED STATES COURTS SHOULD BE RESOLVED	16
IV	
A FEDERAL COURT IS AUTHORIZED TO ENJOIN STATE COURT LITIGATION OF A MARITIME CAUSE OF ACTION CONDITIONALLY DISMISSED IN THE FEDERAL COURT ON THE GROUND OF FORUM NON CONVENIENS	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

	Page
Air Crash Disaster Near New Orleans, La., In re, 821 F.2d 1147, 1987 A.M.C. 2735, (5th Cir. 1987)	10
Air Logistics, Inc. v. Tallentire, No. 85-202, 106 S.Ct. 2485 (1986)	4
Allen v. McCurry, 449 U.S. 90 (1980)	17
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	11
Asahi Metal Indus. Co. v. Superior Court, 107 S.Ct. 1026 (1987)	14
Askew v. American Waterways Operators, 411 U.S. 325 (1973)	4
Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522 (1931)	11
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	14
Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)	12
Canada Melting Co. v. Peterson, 285 U.S. 413 (1932)	14
Dames & Moore v. Regan, 453 U.S. 654 (1981)	13
Garrett v. Moore — McCormack Co., 317 U.S. 239 (1942)	9
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	12
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)	9, 10
Guidry v. Durkin, 834 F.2d 1465 (9th Cir. 1987)	13
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	14, 15
Hanna v. Plumer, 380 U.S. 460 (1965)	10
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	11

TABLE OF AUTHORITIES

CASES

	Page
Kassapas v. Arkon Shipping Agency, 485 So.2d 585 (La. Ct. App. 5th Civ.) Writ denied, 488 So.2d 203 (La. 1986)	16
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	8
Lindgren v. United States, 281 U.S. 38 (1930)	12, 15
Missouri v. Mayfield, 340 U.S. 1 (1950)	14
Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985)	13
Mizokami Bros. v. Mobay Chemical Corp., 660 F.2d 712 (8th Cir. 1981)	17
Panama Railroad Co. v. Johnson, 264 U.S. 375 (1924)	8, 9
Parsons v. Chesapeake & Ohio R.R. Co., 375 U.S. 71 (1963)	14, 17
Pastewka v. Texaco, Inc., 565 F.2d 851, 1979 A.M.C. 190 (3d Cir. 1977)	10, 17
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	15
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	4
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	6
Sherrill v. Brinkerhoff Maritime Drilling, 615 F.Supp. 1021	16
Southland v. Keating, 465 U.S. 1 (1984)	13, 15
Testa v. Katt, 330 U.S. 386 (1947)	15
The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1967)	12, 15
The Lottawanna, 88 U.S. 558 (1987)	8

TABLE OF AUTHORITIES

CASES

	Page
The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867)	12, 15
The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch.) 116 (1812)	13
Zipfel v. Haliburton, 820 F.2d 1438 (1987)	16
Zoriano Sanchez v. Caribbean Carriers, 552 F.2d 70 (2d Cir.) cert. denied, 434 U.S. 853 (1977)	17
Constitution	
United States Constitution, Art. I, Sec. 8, Clause 3	7
United States Constitution, Art. I, Sec. 8, Clause 18	7
United States Constitution, Art. III, Sec. 2, Clause 3	7
United States Constitution, Art. VI, Sec. 2	7
Miscellaneous	
S. Rep. 1876, 93rd Cong., 1st Sess., Federal Court Jurisdiction Bill	2
The Federalist, No. 80, pp. 497-498 (Lodge ed. 1908)	6
Rules	
United States Maritime Law Association Rules, Rule 36.2	1
Statutes	
37 Stat. 1658, Salvage (1910)	3
51 Stat. 233, Ocean Bills of Lading (1924)	3
United States Code, Title 9, § 3	13
United States Code, Title 15, §78aa	11
United States Code, Title 28, § 1602 et. seq.	13
United States Code, Title 28, § 1333	8

Table of Authorities

Statutes

	Page
United States Code, Title 28, § 1333(1)	12
United States Code, Title 28, § 1346(b)	11
United States Code, Title 28, § 2283	5, 16, 17
United States Code, Title 33, §§ 1161-65 (1970)	2
United States Code, Title 33, §§ 1251-1376 (1972)	2
United States Code, Title 33, §§ 2001-73	2
United States Code, Title 46, § 688(a)	12
United States Code, Title 46, § 688(b)	12
United States Code, Title 46, §§ 727-31 (1912)	2
United States Code, Title 46, § 740 (1948)	2
United States Code, Title 46, § 742	13
United States Code, Title 46 § 761	12
United States Code, Title 46, § 782	13
United States Code, Title 46, §§ 3300-15 (1936)	2

Textbooks

Benedict, On Admiralty Collision (1910), Doc. No. 3-2	3
6 Benedict, Limitation of Liability (1976) Doc. No. 5-4	3
6 Benedict, Oil Pollution Damages, p. 951 (1969) Doc. No. 6-3	3
6A Benedict, Maritime Liens and Mortgages (1967) Doc. No. 8-3	3

Table of Authorities

Textbooks

	Page
Eliot, J., The Debates in the Several State Conventions on the Adoption of the Federal Constitution (1836) pp. 532, 571	6
Restatement (Second) on Judgments, Sec. 27	17
Singh, International Conventions of Merchant Shipping (2d Ed. (1973))	3

No. 87-505

In the Supreme Court
OF THE
United States

OCTOBER TERM 1988

CHICK KAM CHOO, et al.,
Petitioners,

VS.

EXXON CORPORATION, et al.,
Respondents.

On Appeal from the United States Court of Appeal for the Fifth Circuit

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE.

The Maritime Law Association of the United States (MLA) respectfully submits this brief as Amicus Curiae in support of affirmance, on consent of all parties, pursuant to Rule 36.2.[1]

INTEREST OF AMICUS CURIAE

Applicant, The Maritime Law Association of the United States (MLA), has a strong interest in this case. MLA is

[1]The original letters consenting to submission of this brief have been submitted to the Clerk for filing herewith.

a nationwide bar association founded in 1899. It has a membership of more than 3,700 attorneys, federal judges, law professors, and others interested in maritime law. It is affiliated with the American Bar Association, and is represented in that Association's House of Delegates.

MLA's attorney members represent all maritime interests — shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters, and other maritime claimants and defendants.

MLA's purposes are stated in the Articles of Association:

> The objects of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, MLA has sponsored much federal maritime legislation.[2]

MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization (IMO).

---

[2]46 U.S.C. §§ 727-31, Salvage Act (1912); 46 U.S.C. §§ 3300-15, Carriage of Goods by Sea Act (1936); 46 U.S.C. § 740, Admiralty Extension Act (1948); 33 U.S.C. §§ 1161-65, Water Qualtiy Improvement Act (1970); 33 U.S.C. §§ 1251-1376, Water Pollution Control Act (1972); S. 1876, 93rd Cong., 1st Ses, Federal Court Jurisdiction Bill; 33 U.S.C. §§ 2001-73, Inland Navigation Rules.

From time to time, MLA recommended improvements in the former General Admiralty Rules of the Supreme Court, and assisted the Court's Advisory Committee on Admiralty Rules in unification of the General Admiralty Rules and the Federal Rules of Civil Procedure. John McHose, Counsel of Record, was a member of that Advisory Committee.

MLA is one of some 45 national maritime law associations constituting the Comite Maritime International[3], seeking *international* uniformity in maritime law through international conventions.[4]

Uniformity in maritime law, both national and international, prompted MLA adoption, in 1975, of a Resolution which states:

> RESOLVED, that the Maritime Law Association of the United States considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States.

---

[3]These now include Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela, and Yugoslavia.

[4]37 Stat. 1658, Salvage (1910); 51 Stat. 233, Ocean Bills of Lading (1924); Benedict on Admiralty Collision (1910), Doc. No. 3-2. 6 Benedict, Limitation of Liability (1976), Doc. No. 5-4. Singh, International Conventions of Merchant Shipping (2d Edition (1973)). Maritime Liens and Mortgages (1967), 6A Benedict Doc. No. 8-3. 6 Benedict 951, Oil Pollution Damages (1969), Doc. No. 6-3.

A substantially identical resolution was adopted by the American Bar Association in 1976.

In 1986 MLA reaffirmed the policy by the following Resolution:

> Now, therefore, this Association reaffirms its support of the importance of maintaining national uniformity in maritime law and approves action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action which impairs uniformity in maritime law.

MLA has a Standing Committee on Uniformity of U.S. Maritime Law.

In furtherance of the uniformity policy, MLA has filed amicus briefs in a number of cases, including three accepted by this Court.[5]

It is MLA policy to file briefs as amicus curiae only when an important issue of maritime law is involved and when the court's decision may substantially affect uniformity.

SUMMARY OF ARGUMENT

Congress has granted State courts only limited jurisdiction to hear maritime cases. Maritime cases are governed by Federal law which applies uniformly in Federal and State courts alike.

---

[5] *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Air Logistics, Inc. v. Tallentire*, No. 85-202, 106 S.Ct. 2485 (1986).

The Federal doctrine of *forum non conveniens* is a door-closing measure which must be enforced by State courts in maritime cases regardless whether an analogous door-closing measure exists under State law.

The Federal district court has decided on the ground of *forum non conveniens* that this maritime suit should not be tried in the United States. The Federal court's determination of that issue, regardless whether characterized as procedural or substantive, is *res judicata*.

A later effort by the plaintiff to bring the same suit in a Texas State court threatened to nullify the decision of the Federal court which was, therefore, authorized by 28 U.S.C. Sec. 2283 to "protect and effectuate its judgment" by enjoining the State court proceedings.

ARGUMENT

I

THE DECISION SHOULD BE BASED ON THE PRINCIPLE OF UNIFORMITY OF MARITIME LAW.

A. The Founding Fathers Agreed Maritime Law, Controlled by the Federal Government and Supreme Court, Should be Uniform in all Courts in the United States.

At the Virginia Convention in 1787, Governor Randolph stated:

> "*Cases of admiralty and maritime jurisdiction* cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign nations may be affected by admiralty decision; as they ought therefore, to be uniform; and as there can be no uniformity if there be

thirteen distinct, independent jurisdictions, — this jurisdiction ought to be in the federal judiciary."[7]

Alexander Hamilton of New York wrote:

> The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[8]

James Madison stated at the Virginia Convention:

> "There are strong reasons why there should be a Supreme Court to decide [certain] disputes. If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity. The same principles hold with respect to cases affecting ambassadors and foreign ministers. To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can be done only by giving the judiciary exclusive jurisdiction."[9]

---

[7]J. Eliot, The Debates in the Several State Conventions on the adoption of the Federal Constitution (1836) 571. (Emphasis in original quote).

[8]The Federalist, No, 80, 497-498 (Lodge ed. 1908). This was quoted in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361 n.8 (1959).

[9]J. Eliot, The Debates (*supra*) 532.

B. The Intent to Maintain National Uniformity was Confirmed in the Constitution.

Article I, Section 8, Clause 3 (The Commerce Clause) states:

> The Congress shall have power • • • to regulate commerce with foreign nations, and among the several states.

Article I, Section 8, Clause 18 (The Necessary and Proper Clause) states:

> The Congress shall have power • • • To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers • • •.

Article III, Section 2, Clause 3 (The Admiralty Clause) states:

> The judicial power shall extend • • • To all cases of admiralty and maritime jurisdiction.

Article VI, Section 2, (The Supremacy Clause) states:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; • • • shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Admiralty and Necessary and Proper Clauses, and decisions interpreting them, confirm that, except in areas of purely local concern, the general maritime law is to apply in all admiralty and maritime cases in the United States. The Supremacy Clause requires state courts to follow established maritime law.

C. Although Congress has Delegated a Portion of Admiralty Law Jurisdiction to the State Courts, They are Required to Apply Federal Admiralty Law.

Congress, in implementing provisions by statute, recognized from the first that it might not be convenient to bring every maritime case to one of the few federal courts, delegated to the state courts an alternative limited jurisdiction to hear ordinary *in personam* maritime causes of action not involving the special procedures and remedies of admiralty, such as arrests, perfection of liens, etc. This was done by the "saving to suitors" clause in the Judiciary Act of 1789, now reworded in 28 U.S.C. 1333.

In 1987, the Supreme Court stated in the *Lottawanna*, 88 U.S. 558:

> "One thing, however is unquestionable: The Constitution must have referred to a system of law coextensive with, and operating uniformally in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several states * * *." (p. 575)

In 1920, the Court in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, referring to the approval and adoption of the general maritime law as part of the laws of the United States, held:

> "To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose * * *." (p. 160)

In *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924), the Court pointed out at page 386 in discussing "admiralty and maritime jurisdiction":

> "The framers of the Constitution were familiar with that system (admiralty) and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject — its substantive as well as its procedural features — under national control * * *"

In many Maritime cases, procedure is as important as substantive law.

D. Calling the Dismissal "Procedural" Does not Resolve the Case.

To say that the principle of uniformity ought to be limited to "substance" and denied to "procedure" (contrary to *Panama Railroad Co. v. Johnson*) does not resolve the question here.

This Court has rejected the use of the epithet "procedural" as a means of deciding cases. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Court clearly recognized the infirmity of such analysis:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substance" nor "procedure" represents the same variance. Each implies different variables depending upon the particular problem for which it is used. (p. 108)

One of the cases with which the court illustrated the point was *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942), a maritime case which had come up through the state courts. The Court held that a burden of proof, however it might be thought to be procedural, had

such consequences that the federal rule must be used by the state court.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court reaffirmed its view that the dichotomy between "substance" and "procedure" was not adequate for deciding cases, while making clear that the criterion of "outcome-determination" is also not a universal rule. In both *Guaranty Trust* and *Hanna*, the Court stressed the discouragement of forum-shopping as a ground for looking beyond the common epithets in deciding whether federal or state standards should be applied. Other courts of appeals have applied the principle of *Guaranty Trust* and *Hanna* in declining to treat *forum non conveniens* as a conclusion merely "procedural" or unworthy of the dignity of *res judicata*. *E.g., In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1156-57, 1987 A.M.C. 2735, 2746-47 (5th Cir. 1987); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854, 1979 A.M.C. 190, 194 (3d Cir. 1977).

Guaranty Trust and *Hanna* were cases involving the interplay of federal and state legislative jurisdiction as affecting actions in the federal courts, and they arose in a context very closely related to the situation here, which involves the effects of the resulting judgments rather than the laws and rules to be applied in reaching them. The *Guaranty Trust* and *Hanna* cases indicate that the disparaging adjective "procedural" should not be used to decide the quality of a judgment for the purpose of applying it as *res judicata*.

The original judgment of the district court dismissing on the grounds of *forum non conveniens* did not, after all, have the mere effect of a sanction for the violation of a court rule, allowing the plaintiff to refile in compliance with the rule or in another court under different rules. Although granted for different reasons and on a different

showing, the judgment had the same effect as though the Petitioner's case had been dismissed for lack of jurisdiction. And, because the district court found that the suit was inappropriate in the United States, the effect was intended to be exactly as though there had been a leak of adequate contacts of the defendant with the United States under the standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). A judgment on that ground would be *res judicata*. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932) ("The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.") *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522 (1931) (personal jurisdiction).

If a decision should be made that judgments so far-reaching as the judgment in this case are unworthy to be treated as "judgments" under the Act, and that maritime plaintiffs should be free to pursue the defendants a second time in the United States despite the express and deliberate decision of a federal admiralty court, affirmed on appeal, that their claims do not belong in this country, such a decision should be made by thoughtful analysis rather than pejorative epithet.

II

UNIFORMITY REQUIRES THAT IN MARITIME CASES SOME FEDERAL DOOR-CLOSING MEASURES BIND THE STATE COURTS LIKE THE ONE INVOLVED HERE.

Although the Federal Government has limited powers, when it exercises those powers it is authorized under the Supremacy Clause to bind the States, and may give exclusive jurisdiction to Federal courts in such matters. *See, e.g.*, 15 U.S.C. § 78aa [Securities Exchange Act cases], 28 U.S.C. § 1346(b) [tort claims against the

United States]. This Constitutional principle has been applied on many occasions in the form of Federal door-closing measures which bind State courts. This is especially true in admiralty cases where Congress has consistently pursued uniformity and given Federal courts "exclusive" jurisdiction, except for delegating a limited jurisdiction to State courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

A. Maritime Remedies.

Among the earliest door-closing measures was the decision that jurisdiction *in rem*, to enforce maritime liens against ships, lay exclusively in the Federal admiralty courts. The *Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867). The *Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1967).

Similarly, Federal and State courts in maritime cases are closed by the Jones Act and the Death on the High Seas Act to claimants who might be entitled under State law to remedies for wrongful death, but who are not given standing to sue in those Acts. 46 U.S.C. §§ 688(a), 761; *Lindgren v. United States*, 281 U.S. 38 (1930); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). Most recently, in an explicit door-closing statute, Congress barred both State and Federal courts from hearing maritime personal injury and death suits by certain aliens in the foreign offshore oil industry. 46 U.S.C. § 688(b).

B. Foreign Forum Clauses.

In an admiralty case, this Court described the criteria for enforcing a foreign forum clause, thereby closing all courts here to certain disputes arising under international maritime contracts. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). This court has likewise confirmed the

power of the Federal Government in the conduct of foreign affairs, to cut off access to both Federal and State courts, and to require private parties with claims against Iran to proceed before an international tribunal. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

C. Arbitration.

Congress has mandated that all American courts must stay their proceedings whenever a party invokes a valid arbitration clause in a suit involving maritime, international, or interstate commerce, regardless whether the underlying claims arise under Federal or State law. 9 U.S.C. § 3; *Southland v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

D. Sovereign Immunity.

The sovereign immunity of the Federal Government in tort was first waived just for maritime cases. 46 U.S.C. §§ 742, 782 [1920 suits in Admiralty Act, 1925 Public Vessels Act]. Even today only the Federal Courts and not the State Courts, are permitted to hear such cases. *Guidry v. Durkin*, 834 F.2d 1465, 1473 (9th Cir. 1987) ["in the interests of national uniformity"].

The seminal decision closing our courts to certain suits against foreign sovereigns was written by Chief Justice Marshall in an admiralty case. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812). Many years later, Congress codified that, with some exceptions, no Federal or State court could entertain such suits. 28 U.S.C. § 1602 *et seq.*

E. Acts of State Doctrine.

This court has ruled in a case involving ocean bills of lading that, as a matter of Federal common law, our courts are generally closed to claims which call into question the acts of foreign sovereigns in their own territories. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427 (1964) ["binding on federal and state courts alike"].

F. Insufficient Contacts With the Forum.

In the context of the due process clause, this Court recently ruled that a products liability suit against a foreign manufacturer, with no more contact than the expectation that his product would enter the stream of commerce, should not be heard by a Federal or State court. *Asahi Metal Indus. Co. v. Superior Court,* 107 S.Ct. 1026 (1987).

G. Forum Non Conveniens.

The doctrine of *forum non conveniens* is another type of door-closing measure first enunciated by this Court in an admiralty suit. *Canada Melting Co. v. Paterson,* 285 U.S. 413 (1932). The question here is not when State courts may close their own doors to Federal claims, *Missouri v. Mayfield,* 340 U.S. 1 (1950), but rather when State courts *must* close their doors to maritime suits.

In *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), this Court identified the factors which were relevant to application of *forum non conveniens.* Weight given these factors may vary from court to court depending on such local considerations as proximity of the forum to the events or witnesses, docket congestion, and a predilection for concentrating on local affairs. *Parsons v. Chesapeake & Ohio R.R. Co.,* 375 U.S. 71 (1963).

In *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), the court held that if a court could not dismiss a case on the ground of *forum non conveniens*:

> The American courts which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

Id. at 252.

It would be an abuse of discretion for *any* district court to decline to enforce the doctrine of *Gulf Oil* and *Piper v. Reyno* when applicable. These cases mandate that some cases simply not be tried in the United States at all if an adequate forum is available abroad.

In *Testa v. Katt,* 330 U.S. 386 (1947) this Court held that State courts which lacked jurisdiction under State law to hear Federal claims could be required by Federal law to hear them nonetheless. The converse is equally true. In a maritime case where under *Gulf Oil* and *Piper v. Reyno* no district court could hear the case, a State court likewise should be required to apply the doctrine and dismiss.

The existence of a State door-opening statute does not alter the result. A State Legislature lacks power to keep State courts open to hear claims for which they have been deprived of jurisdiction by Federal law. *See* the *Moses Taylor, supra;* the *Hine v. Trevor, supra, Lindgren v. United States, supra,* 281 U.S. at 47; *Southland v. Keating, supra,* 465 U.S. at 15-16. In enacting the "saving to suitors" clause, Congress granted State courts "partially concurrent" jurisdiction to hear some admiralty suits. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 161 (1920). But, Congress quite clearly never intended that State

courts should exercise greater jurisdiction in maritime cases than Federal courts.

III

CONFLICT AND UNCERTAINTY CONCERNING CONDITIONAL DISMISSAL ON THE GROUND OF FORUM NON CONVENIENS IN MARITIME CASES IN UNITED STATES COURTS SHOULD BE RESOLVED.

Presently conflict and uncertainty as respects application of the Lauritsen-Romero-Rhoditis[10] principles in maritime cases in United States courts is demonstrated by a number of cases. They include the case at bar, *Zipfel v. Haliburton*, 820 F.2d 1438 (1987), see also *sub nom., Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021, and *Kassapas v. Arkon Shipping Agency*, 485 So.2d 565 (LA. Ct. App. 5th Cir.) Writ denied, 488 So.2d 203 (LA. 1986). The *Kassapas* case is discussed at length by Judge Gee in the opinion in the case at bar. He correctly calls Kassapas "plainly wrong". This analysis is sound.

IV

A FEDERAL COURT IS AUTHORIZED TO ENJOIN STATE COURT LITIGATION OF A MARITIME CAUSE OF ACTION CONDITIONALLY DISMISSED IN THE FEDERAL COURT ON THE GROUND OF FORUM NON CONVENIENS.

This is not a matter where a district court has tried to impose its interpretation of Federal law on a State court by way of injunction in a collateral suit. Such efforts have been condemned by the Congress and by this Court. 28

---

[10]345 U.S. 571; 358 U.S. 373; 398 U.S. 306.

U.S. 2283; *See Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). However, where there has been an earlier suit in the Federal court the Anti-Injunction Statute expressly authorizes the Federal court to restrain later State court proceedings if "necessary • • • to protect or effectuate its judgment." 28 U.S.C. § 2283.

It may not be necessary to protect such a judgment when a dismissal on the ground of *forum non conveniens* is based on local considerations such as docket congestion and proximity of witnesses. *See Parsons v. Chesapeake Ohio R.R. Co., supra.* But here the district court's ruling was that this maritime suit should not be heard in the United States at all. 699 F.2d at 694. The ruling was not based on local considerations; nor was it appealed.

To be sure the ruling in the case at bar was not a decision on the ultimate "merits" of plaintiffs' claim. However, there are other types of rulings which are suitable for issue preclusion treatment. *See Restatement (Second) on Judgments*, § 27; *Allen v. McCurry*, 449 U.S. 90 (1980) [State court ruling on suppression motion in criminal trial binding on a Federal court in subsequent civil rights proceedings]; *Pastewka v. Texaco*, 565 F.2d 851 (3d Cir. 1977) [Federal court dismissal of an admiralty suit on grounds of *forum non conveniens* binding on second Federal court]; *Zoriano Sanchez v. Caribbean Carriers*, 552 F.2d 70 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977) [same]; *but cf. Mizokami Bros. v. Mobay Chemical Corp.*, 660 F.2d 712 (8th Cir. 1981) [dictum — Federal court dismissal of a diversity suit on grounds of *forum non conveniens* not binding on second Federal court].

The judgment of the Federal court below, that this maritime suit should not be heard in the United States, would have been nullified if the Texas State court pro-

ceedings had gone forward. In pursuit of uniformity, the district court therefore took both authorized and proper action to protect and effectuate its judgment by enjoining the State court proceedings.

It is submitted that, after a Federal Court applying established maritime law has dismissed a maritime case on the ground of *forum non conveniens*, holding that the case should not be brought in the United States, no State court should hear the same case.

Maritime law must be applied to maritime cases and govern their outcome. If cases such as this can be filed in State courts and permitted to be governed by State law, which may differ from federal maritime law, uniformity of maritime law in the United States is destroyed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: February 19, 1988.

Respectfully submitted,

JOHN C. MCHOSE
Counsel of Record
RICHARD W. PALMER
MICHAEL MARKS COHEN
725 South Figueroa Street
Los Angeles, CA 90017
(213) 488-7100
Attorneys for the Maritime Law Association of the United States as Amicus Curiae

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 19, 1988, I served the within Amicus Curiae in re: "Chick Kam Choo vs. Exxon Corporation" in the United States Supreme Court, October Term 1987, No. 87-505;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James Patrick Cooney
2200 Texas Commerce Tower
Houston, Texas 77002
Counsel for Respondents

Benton Musselwhite
609 Fannin, Suite 517
Houston, Texas 77002
Counsel of Record for Petitioners

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 19, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

No. 87-505

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE, McCLELLAND ENGINEERS, INC., OCEANEERING INTERNATIONAL INC. AND HALLIBURTON COMPANY

HAROLD A. STONE
STEVEN M. PERL
(Counsel of Record)
One Embarcadero Center, Suite 1350
San Francisco, California 94111
(415) 391-4200
Attorneys for Amicus
McClelland Engineers, Inc.

GRAYDON S. STARING
Two Embarcadero Center
San Francisco, California 94111
Attorneys for Amicus
Halliburton Company

ELLIOT L. BIEN
555 California Street
San Francisco, California 94104
Attorney for Amicus
Oceaneering International, Inc.

GUDMUNDSON, SIGGINS, STONE & SKINNER
LILLICK, McHOSE & CHARLES
BRONSON, BRONSON & McKINNON
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 2

Argument 3

I

Introduction 3

II

Zipfel Was Erroneously Decided 4

A. The Procedural History and Background of *Zipfel* .. 5

B. Petitioners' Citations of *Zipfel* Do Not Support Reversal of the Fifth Circuit 8

III

Reversal of the Fifth Circuit Would Have Chaotic Implications 10

Conclusion 12

TABLE OF AUTHORITIES

Cases

	Page
Castner v. First National Bank, 278 F.2d 376 (9th Cir. 1960)	6
Exxon v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 343 (1987)	passim
Guaranty Trust Company v. York, 326 U.S. 99 (1945)	9
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	7
Hanna v. Plumer, 380 U.S. 460 (1965)	8
Midkiff v. Tom, 725 F.2d 502 (9th Cir. 1984), reversed (on other grounds) 467 U.S. 229 (1984)	10
Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981)	7
Sherrill v. Brinkerhoff Maritime Drilling, 615 F.Supp. 1021 (N.D. Cal. 1985)	6
Southwest Texas Airlines Company v. Texas International Airlines, 546 F.2d 84 (5th Cir. 1977) *cert. denied*, 434 U.S. 229 (1984)	10
Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941)	11
Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515 (9th Cir. 1983)	3, 10
Zipfel v. Halliburton Company, et al., 820 F.2d 1438 (9th Cir. 1987)	4, 7
Zipfel v. Halliburton Company, et al., 832 F.2d 1477 (9th Cir. 1987), *pet'ns. for cert. filed sub nom., Crowley Maritime Corp. v. Zipfel*, No. 87-1122 (Jan. 4, 1988) & *Halliburton Co. v. Zipfel*, No. ___ (Jan. 12, 1988)	passim

Statutes

Anti-Injunction Act (22 U.S.C. § 2283)	8, 11
Death on the High Seas Act (46 U.S.C. §§ 761, et seq.)	3-4
Jones Act (46 U.S.C. § 688)	3, 7

No. 87-505

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE, McCLELLAND ENGINEERS, INC., OCEANEERING INTERNATIONAL INC. AND HALLIBURTON COMPANY

This brief is submitted on behalf of McClelland Engineers, Inc., Oceaneering International Inc. and Halliburton Company, in support of respondents Exxon Corporation and Esso Tankers, Inc. Both petitioners and respondents have consented in writing to the filing of this *amicus curiae* brief. *Amici* have filed with the clerk of this Court letters from counsel for petitioners and respondents consenting to the filing.

INTEREST OF AMICI CURIAE

Petitioners herein are the plaintiff, Chick Kam Choo, and also her attorneys, Benton Musslewhite, Esq. and Joseph C. Blanks, Esq. The injunction in question operated against Choo's attorneys as well as Ms. Choo. (Brief of Petitioners, p. 2, fn. 1.) Petitioners correctly cited a conflict between the Fifth Circuit's opinion, below, and the Ninth Circuit's opinion in *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987) *pet'ns. for cert. filed sub nom.,*

Crowley Maritime Corp. v. Zipfel, No. 87-1122 (Jan. 4, 1988) and *Halliburton Co. v. Zipfel*, No. ____ (Jan. 12, 1988) (*Zipfel*).

Amici are among the defendants/appellees in the *Zipfel* case. Petitioner herein, Benton Musslewhite, Esq. is also the lead attorney representing the plaintiffs/appellants in *Zipfel*. On January 12, 1988, *amici* filed a petition for certiorari in *Zipfel*, based on the same conflict which apparently led this Court to grant the petition herein. *Amici* also requested that this Court consolidate the two cases.

Petitioners' brief on the merits relies extensively on the Ninth Circuit opinion in *Zipfel*. As parties involved in all the proceedings in the district court and in the Ninth Circuit in *Zipfel*, *amici* are in a unique position to comment on the proceedings in that case, on the reasoning of the Ninth Circuit, and on the kind of chaotic forum-shopping that a reversal of the Fifth Circuit's decision herein would authorize. Moreover, *amici* are vitally interested in the disposition of the instant case because it is they who would immediately suffer from the rule that petitioners advance.

SUMMARY OF ARGUMENT

The Fifth Circuit, after a careful and thorough analysis, concluded that

> "Once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, the issue may not be relitigated." (*Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 325 (5th Cir. 1987) *cert. granted*, ____ U.S. ____, 108 S.Ct. 343 (1987) (*Choo*).)

The opinion in conflict, *Zipfel*, was not correctly decided. As in *Choo*, the district court in *Zipfel* had dismissed foreign plaintiffs' actions under *forum non conveniens*, and then enjoined them from relitigating the same issue in any other U.S. court. The Ninth Circuit essentially glossed over the injunction issue at the close of its opinion. Unlike the Fifth Circuit, and without its

thorough analysis, the Ninth Circuit reversed the injunction against the foreign plaintiffs.

The reasoning that was contained in the Ninth Circuit opinion was erroneous. The court ruled that the district court's judgment was one which it was not entitled to "protect or effectuate," by characterizing that judgment, obtained after years of exhaustive litigation, as a ruling on a mere "procedural point." (*Zipfel*, *supra*, 832 F.2d at 1488.) The court held that the injunction against the *American* plaintiff was proper as "necessary in aid of the court's jurisdiction" since, under the Ninth Circuit's ruling, the district court would retain jurisdiction. However, the Ninth Circuit reversed the injunction against the *foreign* plaintiffs, since the Ninth Circuit affirmed their dismissal. Therefore, according to the Ninth Circuit, the district court no longer had jurisdiction needing "aid." That result is not only anomalous, but contrary to the Ninth Circuit's own precedent holding that "a district court retains jurisdiction to enforce the judgment it enters." (*Wood v. Santa Barbara Chamber of Commerce Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984).)

Zipfel presents a glaring example of the chaos the Fifth Circuit seeks to avoid. The blatant forum shopping in *Zipfel* began in a federal court in Texas, moved to a federal court in California, then on to a Texas state court. If this Court allows, it may even move to a fourth inconvenient forum in a California state court. If *Choo* is reversed, petitioners could conceivably try every state and federal court in the land in an effort to find one sympathetic judge.

I

ARGUMENT

INTRODUCTION

In both *Zipfel* and *Choo*, petitioner Benton Musslewhite, Esq. filed actions on behalf of foreign workers who were injured or killed in the course and scope of their employment in connection with a vessel. The plaintiffs in both cases alleged causes of action under the Jones Act (46 U.S.C. § 688), Death on the High Seas

Act (46 U.S.C. §§ 761, et seq.) and general maritime law. The district courts in both cases ruled that American law did not apply, and dismissed the actions under the *forum non conveniens* doctrine, ruling that the cases should be prosecuted in Southeast Asia, where the alleged wrongful acts occurred. In both cases, the district court enjoined plaintiffs and their attorneys from prosecuting the actions in Texas state court, or in any other American court.

In both *Zipfel* and *Choo*, the issue is whether the district court had discretion to enjoin the plaintiffs from proceeding with their actions in Texas state court, or in any other American court.

The Fifth Circuit, in a carefully reasoned opinion, affirmed the granting of the injunction. The Ninth Circuit's opinion affirmed the district court's decision that U.S. law did not apply to the foreign plaintiffs' claims, and its dismissal of their actions under the *forum non conveniens* doctrine, while reversing the *forum non conveniens* dismissal of the American. The Ninth Circuit then affirmed the injunction of the American, but reversed the district court's injunction against the foreign plaintiffs, in a very brief discussion at the close of the opinion. (*Zipfel v. Halliburton Co.*, 820 F.2d 1438 (9th Cir. 1987).)

Amici petitioned the Ninth Circuit for rehearing, citing the just issued Fifth Circuit opinion in *Choo* on the injunction issue. As petitioners' brief notes (in footnote 20), in a modified opinion, the Ninth Circuit erroneously found that its decision was not in conflict with the Fifth Circuit's well reasoned opinion, and thus denied rehearing. (*Zipfel v. Halliburton Co.*, *supra*, 832 F.2d 1477.)

Amici filed a petition for certiorari in the *Zipfel* case, based on the conflict between the Fifth and Ninth Circuits. This Court has not yet acted upon *amici*'s petition.

II

ZIPFEL WAS ERRONEOUSLY DECIDED

The Fifth Circuit recognized the blatant forum shopping in which petitioner Musslewhite and his clients were engaging. The

decision recognized that the district court was well within its power in protecting and effectuating its judgment of dismissal, when it enjoined petitioners from taking their forum shopping efforts any further. The court of appeals properly decided that

> "It is time for this litigation to come to an end in the United States and return to Singapore, where it belongs." (*Exxon Corp. v. Chick Kam Choo, supra*, 817 F.2d 307, 325.)

The court concluded:

> "Once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, the issue may not be relitigated." (*Id.*, at p. 314.)

The Ninth Circuit opinion indicates that, unlike the Fifth Circuit, the Ninth Circuit relegated the important injunction issue to an afterthought, after addressing the numerous other issues presented by that appeal. This Court should not adopt the Ninth Circuit's erroneous holding, but should affirm the Fifth Circuit.

A. The Procedural History and Background of *Zipfel*

Zipfel arose out of an air crash in Pekan Baru, Indonesia. The plane's passengers were workers employed on a stationary oil drilling vessel, permanently stationed in Indonesian territorial waters. The workers were en route from Singapore to the vessel. *Zipfel* involved actions by, or on behalf of, five of the workers injured or killed in that Indonesian air crash. *Amici* are the American parent corporations of three foreign companies, each of which provided, in its capacity as a subcontractor to the vessel, one of the injured or killed foreign workers.[1]

Petitioner Musslewhite's forum shopping excursion in *Zipfel* began in the Texas federal courts. He first filed lawsuits on behalf

---

[1] In the district court, *amici* moved for summary judgment on the basis that their subsidiaries, and not *amici*, employed the workers. In light of the *forum non conveniens* dismissal of the actions, *amici* did not continue to pursue that theory.

of his clients in the U.S. District Court for the Eastern District of Texas. He then voluntarily dismissed those suits, and refiled in a second forum, the U.S. District Court for the Northern District of California.

The parties in *Zipfel* litigated exhaustively for years in the Northern District of California over the choice of law and *forum non conveniens* issues. Plaintiffs conducted extensive discovery attempting to establish a nexus between the U.S. and the air crash. The first district judge assigned to the cases ruled that U.S. law applied to all of the cases (some brought by foreign plaintiffs, some by Americans). The cases were then assigned to a second district judge. *Amici* and the other defendants moved for reconsideration of the denial of their motions on the basis that the first ruling was clearly erroneous, and the second judge was not bound to follow his predecessor into error. (*Castner v. First National Bank*, 278 F.2d 376, 380 (9th Cir. 1960).) The second district judge did reconsider the motions, and ruled that U.S. law did not apply to the foreign plaintiffs' claims, but did apply to the Americans'. The court then dismissed all of the cases under the *forum non conveniens* doctrine, ruling that the cases should be prosecuted in Singapore or Indonesia, not in the United States. (*Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Cal. 1985).)

Some of the district court actions involved in *Zipfel* settled during the years of litigation. The actions of four foreign plaintiffs and of one American, all represented by petitioner Musslewhite, did not settle. Petitioner Musslewhite also chose not to refile his clients' actions in Singapore or Indonesia, as suggested by the district court. Instead, he activated actions filed in yet a third U.S. forum, the Texas state court, on behalf of his clients.

At that point, *amici* and the other defendants moved in the district court for an injunction against petitioner Musslewhite, his co-counsel and his clients pursuing their actions in Texas state court, or in any other American court. The district court issued that injunction.

By failing to file in Southeast Asia, petitioner Musslewhite allowed the dismissals of his clients' lawsuits to become final

judgments. He then filed appeals in the Ninth Circuit on behalf of the five plaintiffs, which appeals were consolidated as *Zipfel*.

There were numerous issues raised on that appeal. Those issues included whether the second district judge had the power to reconsider the first district judge's ruling, the Jones Act/choice of law factors, whether the district court had the power to dismiss an American's Jones Act claim under the *forum non conveniens* doctrine, the application of the *forum non conveniens* factors set forth in this Court's decisions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), as well as the injunction issue.

At oral argument and in its opinions in *Zipfel*, the Ninth Circuit focused on the propriety of the dismissal of the actions. The court first held that the second district judge was within his discretion in reconsidering the first judge's decision. The court then affirmed the district court's ruling that U.S. law did not apply to the foreign plaintiffs' actions, and affirmed the *forum non conveniens* dismissal of those actions. The court also reversed the *forum non conveniens* dismissal of the American plaintiff, holding that the district court had no power to dismiss an American's action, to which the U.S. Jones Act applied, under that doctrine. Finally, at the close of its opinion, the Ninth Circuit briefly glossed over the injunction issue, without substantial analysis, affirming the injunction against the American, but reversing the injunction against the foreign plaintiffs. (*Zipfel v. Halliburton Co., supra*, 820 F.2d 1438.)

Amici and other *Zipfel* defendants/appellees filed a petition for rehearing in the Ninth Circuit, asking the court to reconsider its reversal of the injunction in light of the newly issued conflicting opinion of the Fifth Circuit. As petitioners' brief notes (at p. 26, fn. 20), the Ninth Circuit's failure to recognize the conflict was the result of a "faulty premise" that the basis for the Fifth Circuit's ruling was that Chick Kam Choo was "simply bound by the earlier judgment which enjoined her from relitigating the case in state court." (*Zipfel v. Halliburton Co., supra*, 832 F.2d 1477, 1488.) As the Ninth Circuit's "faulty premise" led it to find no conflict, the court avoided the necessity of re-examining its decision on the injunction issue. Thus, based on its misunder-

standing of the Fifth Circuit's opinion, the Ninth Circuit refused to analyze the issues raised.

If this Court does not grant the petitions for certiorari filed by *amici* and other defendants/appellees in *Zipfel*, and reverse the Ninth Circuit's judgment, petitioner Musslewhite and his clients will be free to continue their blatant forum shopping. Petitioner Musslewhite had advised *amici* that, if this court allows, he will most likely refile his clients' actions in yet a fourth inconvenient U.S. forum, a California state court.

B. Petitioners' Citations Of *Zipfel* Do Not Support Reversal Of The Fifth Circuit

Petitioners cite *Zipfel* in support of their proposition that the exception to the Anti-Injunction Act (22 U.S.C. § 2283), which allows injunctions which are "necessary in aid of the district court's jurisdiction" ("aid of jurisdiction" exception) "plainly does not apply." (Brief for Petitioners, p. 14, fn. 9.) They further cite *Zipfel* throughout their brief in support of the proposition that the exception to that statute allowing injunctions to "protect or effectuate judgments" (relitigation exception) also does not apply. This Court should not adopt the *Zipfel* holdings cited by petitioners.

The Ninth Circuit apparently disregarded the fact that the district court's rulings on the *forum non conveniens* and related issues came only after a tremendous expense of time, money and energy, involving literally thousands of hours of attorneys' time over several years. The Ninth Circuit reduced all of that effort to prevailing on a "procedural point." Without any further analysis, the Ninth Circuit ruled that the district court's judgment was not one which it was entitled to protect or effectuate by enjoining petitioner Musslewhite and his clients from relitigating the same issue in another court. (*Zipfel v. Halliburton Company*, *supra*, 832 F.2d 1477, 1488.)

The Ninth Circuit's ruling that the relitigation exception did not apply was not only made without thorough analysis, it was contrary to this Court's holdings that labeling decisions as "procedural" versus "substantive" is inappropriate as a means for deciding cases. (*Hanna v. Plumer*, 380 U.S. 460, 465-6 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-9 (1945).) This Court should now rule squarely that parties who have fully litigated an issue to its conclusion should not be free to litigate the same issue over and over, *ad infinitum*.

While the Ninth Circuit ruled that the "aid of jurisdiction" exception did not apply to the injunction against the foreign plaintiffs, it also held that the exception applied to the injunction against the American. The court affirmed the injunction against the American under that exception, since, under the Ninth Circuit's ruling, the district court would retain jurisdiction. It reversed the injunction against the foreign plaintiffs because, once the district court dismissed their suits, it no longer had jurisdiction. (*Zipfel v. Halliburton Co.*, *supra*, 832 F.2d 1477, 1488.) Thus, the Ninth Circuit's language would support the proposition that the injunctions at issue would be proper, as "necessary in aid of the court's jurisdiction," as long as they were issued by a district court with jurisdiction.

The Ninth Circuit's holding that the "aid of jurisdiction" exception did not apply to the injunction of the foreign plaintiffs' claims cannot withstand scrutiny. As a practical matter, it creates a bizarre anomaly. *Amici* might have filed a single motion in the district court, asking the court to make two rulings, one dismissing the actions, and one enjoining petitioner Musslewhite and his clients from prosecuting their actions in any other U.S. forum. Under the Ninth Circuit's ruling, the district court could then have properly issued the injunction against the foreign plaintiffs, in the same order in which it granted the motions to dismiss. However, *amici* and the other defendants/appellees in *Zipfel* did not move for the injunction until they learned that petitioner Musslewhite had activated his clients' Texas state court actions, rather than follow the district's court's suggestion that he refile the actions in Southeast Asia. Since the motion was made after the court had declined jurisdiction, the Ninth Circuit ruled that any injunction against the foreign plaintiffs and their attorneys was improper.

In addition, the Ninth Circuit's holding that, having dismissed the cases, the district court divested itself of jurisdiction to enjoin the parties from relitigating the issue, is contrary to settled law,

including the Ninth Circuit's own prior decisions. The Ninth Circuit has held: "A district court retains jurisdiction to enforce the judgment it enters." (*Wood v. Santa Barbara Chamber of Commerce, Inc., supra*, 705 F.2d 1515, 1524. The Fifth Circuit is in accord. (See *Southwest Airlines Company v. Texas International Airlines*, 546 F.2d 84, 90 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977), holding that an action for injunction to enforce a federal judgment is supplementary or ancillary, and therefore the jurisdiction follows that of the original suit. The *Southwest Texas Airlines* case was cited with approval by the Ninth Circuit in *Midkiff v. Tom*, 725 F.2d 502, 504 (9th Cir. 1984), reversed (on other grounds) 467 U.S. 229 (1984).)

Petitioners' reliance on *Zipfel*, at p. 21, fn. 16 of their brief, is badly misplaced. They note that *Zipfel* held that it was proper for the second district judge to reconsider the first judge's decision denying the *forum non conveniens* motions, as the second district judge was not bound to follow his predecessor into error. (*Zipfel v. Halliburton Co., supra*, 832 F.2d 1477, 1481.) Petitioners, however, seek to use that holding to support the proposition that a district court cannot enjoin parties from relitigating, in another forum, an issue that has been finally and conclusively decided, without error. That is a specious argument.

While a district judge is free to correct the error of his predecessor judge in the same action, that does not imply that a litigant, having lost in the district court *and* in the court of appeals, may then try again in a state court on the identical issue. The Fifth Circuit properly held that a district court may enjoin relitigation of an issue fully litigated and finally decided.

III

REVERSAL OF THE FIFTH CIRCUIT WOULD HAVE CHAOTIC IMPLICATIONS

The history of the *Zipfel* litigation painfully demonstrates the practical effect that reversing the Fifth Circuit would have. Reversal would authorize enterprising forum shoppers such as petitioner Musslewhite to move freely from one inconvenient U.S.

forum to another, in attempts to prosecute their clients' foreign claims.

In Chick Kam Choo's case, the defendant is an oil company doing business nationwide. Presumably, she could obtain *in personam* jurisdiction over Exxon anywhere in the United States. If the Fifth Circuit were reversed, even were the Texas state court also to dismiss Chick Kam Choo's suit, nothing would prevent petitioners from refiling their lawsuit *ad infinitum*, in the courts of all 50 states and all of the federal districts, in the hopes of finding one sympathetic American judge to agree to hear her case. It is hard to imagine a more bizarre or wasteful procedure, or one less calculated to "protect or effectuate the judgment" of the first court to rule.

Petitioners acknowledge that, following the most recent amendment to the Anti-Injunction Act, the dissenting opinion of Mr. Justice Reed in *Toucey v. New York Life Insurance Co.*, 314 U.S 118 (1941) represents the intent of Congress in enacting the present Anti-Injunction Act. (Brief of Petitioners, p. 25, fn. 19.) The language of Mr. Justice Reed's dissent, which petitioners quote at page 25 of their brief, strongly supports affirming the Fifth Circuit:

> "The alternative [to allowing an injunction] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication . . . [W]e find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field. . . . A decree forbidding a defeated party from setting up any right, anywhere, based upon claims adjudged is the usual form where injunctions are appropriate for determining controversies.
>
> (*Toucey v. New York Life Insurance Co., supra*, 314 U.S. 118, 144-5 (Reed J., dissenting.))

Justice Reed could have been describing either the *Choo* or the *Zipfel* case. The alternative to affirming the Fifth Circuit would be federal judgments, such as the judgments in *Choo* and *Zipfel*, entered after years of expense in money and energy, coming to nothing final. Just as Justice Reed was not alarmed by affirming an injunction under these circumstances, this Court should now "find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." Accordingly, this Court should affirm the Fifth Circuit, and affirm the injunction of the district court in Texas.

CONCLUSION

The Ninth Circuit's decision in *Zipfel* was erroneous, and lacked the thorough analysis of the Fifth Circuit. Thus, this Court should not adopt the Ninth Circuit's holding in order to overturn the Fifth Circuit.

A reversal of the Fifth Circuit would authorize blatant and endless forum shopping, resulting in chaos. This Court should have no cause for alarm in confirming that Congress intended to forbid parties who have litigated for years over an issue, from relitigating the identical issue in another forum. Accordingly, *amici* respectfully request that this Court affirm the decision of the Fifth Circuit.

Respectfully submitted,

HAROLD A. STONE
STEVEN M. PERL
(Counsel of Record)
Attorneys for Amicus
McClelland Engineers, Inc.

GRAYDON S. STARING
Attorneys for Amicus
Halliburton Company

ELLIOT L. BIEN
Attorney for Amicus
Oceaneering International, Inc.

GUDMUNDSON, SIGGINS, STONE & SKINNER
LILLICK, MCHOSE & CHARLES
BRONSON, BRONSON & MCKINNON
Of Counsel

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-505

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF CROWLEY MARITIME CORPORATION IN SUPPORT OF THE RESPONDENTS EXXON CORPORATION, ET AL.

ERNEST N. REDDICK, III
(Counsel of Record)
REX M. CLACK
DERBY, COOK, QUINBY & TWEEDT
333 Market Street, Suite 2800
San Francisco, CA 94105
(415) 777-0505

Attorneys for Amicus Curiae
Crowley Maritime Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of Argument	3
Argument	5
A. The District Court Did Not Abuse Its Discretion In Issuing Its Injunction Prohibiting The Maintenance Of An Identical Lawsuit In The Texas State Court	5
1. The District Court Had Power To Enjoin Plaintiffs' State Court Action Under The Relitigation Exception In The Anti-Injunction Act. The Ninth Circuit's Contrary View Leads To Chaotic Results	5
2. In Addition To The Relitigation Exception, The Aid Of Jurisdiction Exception In Section 2283 Applies	11
B. The Arguments Raised By Petitioners Are Not Persuasive And, Except For The *Zipfel* Case, There Is No Legal Authority Supporting The Petitioners' Position	13
Conclusion	19

TABLE OF AUTHORITIES

Cases

Page

Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1955) 16, 17

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) ... 8

Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 14, 17

Browning Debenture Holders' Com. v. DASA Corp., 454 F.Supp. 88 (S.D.N.Y.), *aff'd.* 605 F.2d 35 (2d Cir. 1978) 11, 15

Burnett v. N.Y. Central Ry. Co., 380 U.S. 424 (1965) ... 3

Chick Kam Choo v. Exxon Corp., et al., 699 F.2d 693 (5th Cir.), *cert. denied sub nom.* Chick Kam Choo v. Esso Oil Company, 464 U.S. 826 (1983) 4

Chick Kam Choo v. Exxon Corp. et. al., 764 F.2d 1148 (5th Cir. 1985) 4

Complaint of Cosmopolitan Shipping Co., S.A., 453 F.Supp. 268 (S.D.N.Y. 1978) 16

Domingo v. States Marine Lines, 340 F.Supp. 811 (S.D.N.Y. 1972) 17

Dugas v. American Surety Co. New York, 300 U.S. 414 (1937) 12

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir.), *reh'g denied*, 823 F.2d 552 (5th Cir. 1987) ..... passim

Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981) 7, 15

In Re Ocean Ranger Sinking Off Newfoundland, 617 F.Supp. 435 (E.D. La. 1985) ..... passim

Izquierdo v. Cities Service Oil Co., 244 F.Supp. 758 (S.D.N.Y. 1965) 3

Koziol v. The FYLGIA, 230 F.2d 651 (2d Cir.), *cert. denied*, 352 U.S. 827 (1956) 8

TABLE OF AUTHORITIES

CASES

Page

Marczak v. McAllister Bros., Inc., 439 F.Supp. 1075 (S.D.N.Y. 1977) 3

Mitchum v. Foster, 407 U.S. 225 (1972) 10

Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964) ... 7

Parsons v. Chesapeake & O. Ry. Co., 375 U.S. 71 (1963) (*per curiam*) 18

Pastewka v. Texaco, Inc., 565 F.2d 851 (3d Cir. 1977) ... 7

Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982) 18

Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1960) 17

Reynolds v. Logan Charter Service, Inc., 565 F.Supp. 84 (N.D. Miss. 1983) 3

Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) 6

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 12

State of Missouri Ex. Rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950) 14

Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941) 10, 16

Veba-Chemie A.G. v. M/V GETAFIX, 711 F.2d 1243 (5th Cir. 1983), *reh'g denied*, 724 F.2d 976 (5th Cir. 1984) .. 18

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, *reh'g denied*, 434 U.S. 881 (1977) 12

Villar v. Crowley Maritime Corporation, 782 F.2d 1478 (9th Cir. 1986) ..... passim

Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984) 12

TABLE OF AUTHORITIES

CASES

	Page
Zipfel v. Halliburton Co., 832 F.2d 1477 (9th Cir. 1987)	passim
Zoriano Sanchez v. Caribbean Carriers Ltd., 552 F.2d 70 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977)	6
Statutes	
28 U.S.C. § 1404(a)	18
28 U.S.C. § 2283	passim
46 U.S.C. § 688	2
Federal Rules	
Federal Rule of Civil Procedure 41(b)	4, 7
Text	
1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(2) (2d ed. 1985)	12
1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(3) (2d ed. 1985)	5

No. 87-505

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF CROWLEY MARITIME CORPORATION IN SUPPORT OF THE RESPONDENTS EXXON CORPORATION, ET AL.

Crowley Maritime Corporation ("Crowley") respectfully submits this brief *amicus curiae* in support of the position of the respondents Exxon Corporation, et al. pursuant to the written consent of the parties to the case, which consents are filed simultaneously herewith.

INTEREST OF THE AMICUS CURIAE

The interest of Crowley in this case arises from the fact that Crowley is the principal defendant in the several Ninth Circuit cases collectively known as *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *petition for cert. filed sub nom Crowley Maritime Corporation v. Zipfel*, No. 87-1122 (Jan. 4, 1988) ("*Zipfel*").

The *Zipfel* case presents the same issue that is before the Court in the present case. Namely, whether or not a federal admiralty

trial court has discretion to issue an injunction prohibiting a plaintiff from relitigating, in the state courts, a lawsuit which has previously been dismissed by that federal court on grounds of *forum non conveniens*. The present *Chick Kam Choo* case will, in all likelihood, be dispositive of the injunction issue in the *Zipfel* case.

In *Zipfel*, plaintiffs brought actions in the United States District Court for the Northern District of California for wrongful death and personal injury under the Jones Act (46 U.S.C. § 688) and under general maritime law. After filing their actions in the federal district court, certain of the *Zipfel* plaintiffs (represented by Petitioner Musslewhite who is also representing Chick Kam Choo herein) filed substantially identical complaints in the state courts of Texas. The state court actions remained dormant while the plaintiffs pursued their actions in the federal court. Motions to dismiss the actions on grounds of *forum non conveniens* were granted by the federal district court, which held that the plaintiffs' cases should properly have been heard in Singapore or Indonesia—not in the United States. The district court's order of dismissal contained certain conditional protections to allow the plaintiffs to refile their actions in Indonesia or Singapore. However, those plaintiffs did not file actions in Indonesia or Singapore. Instead, they activated their Texas state court lawsuits. The federal district court then enjoined the plaintiffs and their attorneys (including Petitioner Musslewhite) from prosecuting such actions. Upon appeal, the Ninth Circuit ruled that the district court had abused its discretion in enjoing the foreign plaintiffs from relitigating their claims in state court.

The Ninth Circuit's decision thus conflicts with the present decision of the Fifth Circuit in *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987). On November 16, 1987, the petition for writ of *certiorari* in the present case, based on that conflict, was granted.

Crowley is vitally interested in the outcome of *Chick Kam Choo* and has requested in its petition for writ of *certiorari* that the *Zipfel* case be consolidated with the present case so that Crowley will have the opportunity to present its views to the Supreme Court as a party. Additionally, Crowley is the principal

defendant in another Ninth Circuit case entitled *Villar, et al. v. Crowley Maritime Corporation, et al.* (9th Cir. No. 86-2381) ("*Villar*"), where precisely the same injunction issue is presented upon the same facts as are present in *Chick Kam Choo* and *Zipfel*. The *Villar* plaintiffs are also represented by Petitioner Musslewhite. On December 16, 1987, the Ninth Circuit issued its order that submission of the *Villar* case was vacated pending this Court's decision in *Chick Kam Choo*.

SUMMARY OF ARGUMENT

The federal district court in Houston did not abuse its discretion in issuing an injunction precluding the plaintiffs from relitigating exactly the same complaint in the Texas state court that the district court had dismissed. The injunction is allowed pursuant to the second and third exceptions in the Anti-Injunction Act (28 U.S.C. § 2283). Petitioners (and the Ninth Circuit) are in error in suggesting that a *forum non conveniens* dismissal is not "on the merits" so as to preclude injunctions against relitigation. A judgment on the merits has been rendered as to the matters which were actually adjudicated.

Petitioners' theory would allow a disappointed foreign litigant whose action has been dismissed under the doctrine of *forum non conveniens* in a federal admiralty court to infinitely relitigate the forum issue. Even if Exxon were successful in convincing the Texas state court to decline to hear the case, what happens next? By petitioners' logic, they could then refile their suits in the California state courts. Assume Exxon is again successful in California. Petitioners then go on to the next jurisdiction in pursuit of Exxon and so on through the 50 states in the hope that somewhere a single sympathetic judge will decide to keep the case.[1] It is hard to imagine a more bizarre procedure.

---

[1] During all these proceedings the statutes of limitation would be tolled. *Burnett v. N.Y. Central Ry Co.*, 380 U.S. 424 (1965); *Reynolds v. Logan Charter Service, Inc.*, 565 F.Supp. 84 (N.D. Miss. 1983); *Marczak v. McAllister Bros., Inc.*, 439 F.Supp. 1075 (S.D.N.Y. 1977); *Izquierdo v. Cities Service Oil Co.*, 244 F.Supp. 758 (S.D.N.Y. 1965).

The basic issue that was before the district court in Houston was the appropriateness of the United States forum. That issue was litigated and decided. However, petitioners' position that the district court possesses no power to enjoin relitigation of this issue will lead to a complete waste of federal judicial resources. Instead of preventing or discouraging relitigation, petitioners actually invite relitigation with their view that a judgment of dismissal is not a "judgment" for the purposes of 28 U.S.C. § 2283.

Petitioners wish to refight their lost U.S. forum battle *ab initio*. They should not be allowed to restart the suit in another U.S. trial court but should remain in Singapore where they live and where the district court and the Fifth Circuit indicated the case should properly be heard. It is completely ill-advised to suggest that the parties repeat the tedious *forum non conveniens* process all over again in the state court even though the state might technically have jurisdiction. Petitioners chose the federal forum to pursue their claims. If they thought the state court presented a more appropriate forum, they should have filed their lawsuit there.

The essence of Petitioner Choo's and Petitioner Musslewhite's argument is that the vast federal litigation in these cases, including what the Fifth Circuit has referred to as "Choo I" (699 F.2d 693 (5th Cir.) *cert. denied sub nom. Chick Kam Choo v. Esso Oil Company*, 464 U.S. 826 (1983)), "Choo II" (764 F.2d 1148 (5th Cir. 1985)) and the present case "Choo III" (817 F.2d 307 (5th Cir. 1987)), not to mention the proceedings in the federal district court, was a meaningless exercise of federal judicial effort since the federal judgment has no preclusive effect.

The sole case which supports plaintiffs' position is the Ninth Circuit's *Zipfel* case which gives the injunction issue a very brief treatment with little analysis. In the Ninth Circuit's view, a *forum non conveniens* dismissal is a mere "procedural point" and is not "on the merits." 832 F.2d at 1488. However, in so ruling, the Ninth Circuit overlooked Federal Rule of Civil Procedure 41(b), which provides that such dismissal is "upon the merits."

In sum, allowing the plaintiffs to relitigate in the Texas state court on account of perceived "procedural" differences between the federal and state courts makes no more sense than allowing

relitigation based on perceived differences in jury selection procedures, service of process procedures, or evidentiary matters that arguably might work a different result for a plaintiff if he were given another chance.

ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Issuing Its Injunction Prohibiting The Maintenance Of An Identical Lawsuit In The Texas State Court.

1. The District Court Had Power To Enjoin Plaintiffs' State Court Action Under The Relitigation Exception In The Anti-Injunction Act. The Ninth Circuit's Contrary View Leads To Chaotic Results.

The relitigation exception in the Anti-Injunction Act (28 U.S.C. § 2283) allows a United States district court to enjoin state court proceedings where the injunction will "protect or effectuate" the judgment of the district court:

> A federal court can enjoin state proceedings "to protect or effectuate its judgments." As a part of its function of protecting and effectuating its judgments, a federal court may enjoin the relitigation in state court of issues that the federal court has fully and finally adjudicated. This exception in § 2283 enables a federal court to prevent its judgment from being effectively nullified by a later contrary judgment which the Supreme Court may or may not decide to review. Thus, under circumstances warranting equitable interposition, a party with a favorable federal judgment need not rely on a plea of *res judicata* for the vindication of the rights derived from the judgment. Should the losing party in the federal action attempt to relitigate the matters adjudicated, the federal court may enjoin the action, even though brought in the state court.
>
> 1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(3) (2d ed. 1985).

Petitioners' state court action will subject defendants to a burdensome and repetitious relitigation of the same issues which

the district court decided long ago. Defendants should not have to rely on a plea of *res judicata* in the state court for vindication of their rights as determined by the federal court's judgment on the merits of the dismissal. However, in the Ninth Circuit's view as expressed in *Zipfel*, the relitigation exception would not support the district court's injunction in the present case because there was no decision "on the merits." But the Ninth Circuit's view overlooks the fact that the decision was "on the merits" as to the issue that was litigated, i.e. the inappropriateness and inconvenience of the U.S. forum.

As noted in the Argument Summary, the sole case that supports plaintiffs' position is the *Zipfel* case. Yet, *Zipfel* does so in a most cursory manner. By contrast, the Fifth Circuit's opinion in *Chick Kam Choo* regarding the *res judicata* effect of *forum non conveniens* dismissal is well supported by the precedents in the Second, Third and Seventh Circuits. At 817 F.2d at 312, the Fifth Circuit emphasizes with approval Professor Wright's statement regarding *forum non conveniens* that "[I]ssue preclusion is appropriate if the issue actually remains the same." The Fifth Circuit recognizes that "[T]he species of *res judicata* with which we deal today is known as direct estoppel." The Seventh Circuit is in accord. *See Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977): "The relitigation exception of § 2283 applies not only where the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon."

The Second Circuit stated in *Zoriano Sanchez v. Caribbean Carriers Ltd.*, 552 F.2d 70, 72 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977):

> It is clear from the facts in the present case that plaintiffs-appellants pressed the same claim, involving the same parties and arising out of the same circumstances, before the district court in New York as they did before the district court in Puerto Rico. The issue of subject matter jurisdiction as to the Jones Act claims was "actually litigated and determined by a valid and final judgment", and that determination having been essential to that judgment, appellants are precluded from raising the issue once again in the Southern District of New York.

The Third Circuit agrees that a *forum non conveniens* decision has preclusive effect:

> In this case the appellants point to identical objective criteria and rely on identical material facts underlying the application of those criteria. Their contention amounts to no more than a wish that, in applying the objective criteria to the undisputed facts, a different judge would make the discretionary *forum non conveniens* determination. If appellants expected the district judge in Delaware to exercise a more discreet discretion than his judicial brother in the Southern District of New York, then they should have begun their litigation in Delaware. Having now finally lost in New York, they cannot relitigate the same factual and legal issues in Delaware.
>
> *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854 (3d Cir. 1977).

The Ninth Circuit's view conflicts with Federal Rule of Civil Procedure 41(b) which provides that such a dismissal is "upon the merits." *See Nasser v. Isthmian Lines*, 331 F.2d 124 (2d Cir. 1964), which holds that a so-called "procedural" dismissal is "on the merits" pursuant to Federal Rule of Civil Procedure 41(b).

The Seventh Circuit considered Federal Rule of Civil Procedure 41(b) in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981):

> A more modern view includes not only those judgments based on legal rights, but extends to dismissals on other than traditionally substantive grounds. See Fed.R.Civ.P. 41(b); Reporter's Note, Restatement (Second) of Judgments § 48, at 42-43. Indeed, the Restatement (Second) of Judgments dispenses with the "on the merits" terminology "because of its possibly misleading connotations" Restatement (Second) of Judgments, § 48 at 36 (Tent. Draft No. 1 1973).

The Ninth Circuit in *Zipfel* overlooks its own previous decision in *Villar v. Crowley Maritime Corporation*, 782 F.2d 1478 (9th

Cir. 1986) (the first *Villar* case), where the district court was expressly authorized and directed to make pre-trial findings of disputed factual issues and reach the merits of the *forum non conveniens* and choice of law issues. Thus, the district court's order exercising its discretion to dismiss the *Chick Kam Choo* case was subject to *res judicata* principles for purposes of the Anti-Injunction Act. That act refers to a federal "judgment." The present cases involve a final federal judgment of dismissal.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932), Justice Brandeis stated: "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *See also Koziol v. The FYLGIA*, 230 F.2d 651 (2d Cir.), *cert. denied*, 352 U.S. 827 (1956), which involved a seaman whose federal court Jones Act action was dismissed for *forum non conveniens*. The appellate court held that the dismissal went to the merits and precluded relitigation under the doctrine of *res judicata*.

In both the *Chick Kam Choo* and the *Zipfel* cases (as well as in the pending *Villar* case), the state court actions which plaintiffs filed are substantially similar if not identical to the earlier federal actions. They are identical Jones Act actions brought on behalf of the same plaintiffs against the same defendants and arising out of the same incident involving the same decedents and the same vessels. If the state court actions are allowed to proceed, state court rulings inconsistent with the federal district court judgment could be issued, rendering the district court's decision a nullity.

Many of the arguments made by plaintiffs were also made to the district judge in *In Re Ocean Ranger Sinking Off Newfoundland*, 617 F.Supp. 435 (E.D. La. 1985). Those plaintiffs too were represented by Petitioner Musslewhite. In *Ocean Ranger*, Judge Collins dismissed the actions of the foreign plaintiffs on the grounds of *forum non conveniens*. Thereafter, they filed actions in Matagorda County, Texas. Judge Collins promptly enjoined the state court actions stating:

> The Court finds that this was a flagrant attempt to avoid the effect of the adverse judgment plaintiffs received by this Multidistrict Litigation Court. This action, filed by the same plaintiffs and the same attorneys who actually litigated

> before this Court, is based on the same cause of action presented in the federal forum. The Court finds that this is an effort to relitigate issues already determined by this Court. The Court will not tolerate abuse at [sic] the judicial system through duplicative and harassing litigation. An injunction is the appropriate sanction to preclude this "judicial hopscotch."
>
> 617 F.Supp. at 436.

Perhaps the most disquieting aspect of all is the *Chick Kam Choo* petitioners' (and the *Zipfel* respondents') candid admissions that the Texas state court might well decline, for its own reasons, to give *res judicata* or issue preclusive effect to the previous works of the federal courts and decide under its own doctrine of *forum non conveniens* to keep the cases. After all the time, trouble and effort that the parties and the federal courts have gone through to litigate the issue of the inappropriateness of a U.S. forum, it would be manifestly unjust that a state court judge might decide to keep the cases and proceed to trial. Had defendants lost the *forum non conveniens* argument in federal court, surely they would have had no recourse to the state court to have the matter considered anew. The unfairness of petitioners' position is that, when a nationwide corporation is sued, the plaintiffs may go from forum to forum, losing all the way, until they win a *forum non conveniens* motion. Defendant corporation, on the other hand, must win every single time in all the available U.S. courtrooms until finally the case is dismissed from the United States to plaintiffs' home country.

The *Chick Kam Choo*, *Zipfel* and *Villar* cases have given rise to immense and substantial federal litigation. The incidents which gave rise to the causes of action occurred many years ago. The complaints were filed in federal court years ago. The issues have been brought to or before the courts of appeal on several occasions. The parties and the courts have expended thousands of hours and hundreds of thousands of dollars. Hundreds, if not thousands, of pleadings and other papers are on the district court dockets from San Francisco to Houston. Many lengthy hearings have occurred before the district courts. There have been many oral arguments before the Ninth Circuit and the Fifth Circuit.

Multiple written opinions have been issued and published. There was final adjudication of each of these three cases through the federal system, which judicial system was chosen in the first instance in each case by plaintiffs.

Yet, petitioners here would argue that all of this was for naught and Exxon and Crowley must now be prepared to start over today in Texas and California. Presumably they should be prepared to start over in the future in Oregon, Louisiana or New York. If petitioners' theory is correct, by what principle can they be stopped from applying to an infinite number of courts? If petitioners are correct, the result is to make a mockery of federal *forum non conveniens* and to invite endless relitigation. What does such a strange scenario do but destroy the federal judgment, not "protect or effectuate" it as contemplated by 28 U.S.C. § 2283? This is antithetical to maritime principles of national uniformity established long ago and repeatedly upheld by this Court.

Perhaps the Court may ask what business is it of a federal court to tell a state court which cases it should or should not hear. Doesn't a respectful regard for the workings and capability of the state court system indicate that the district court should avoid conflict with the state court?

One answer to those questions is that Congress did not contemplate that, in each and every case, the federal court must defer to the discretion of the state court to apply relitigation principles and dismiss cases. Otherwise, the express exceptions contained in the Anti-Injunction Act would have been unnecessary. However, perhaps the best answer is that of Justice Reed who dissented in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), wherein the Supreme Court held that a federal court was without power to enjoin state court relitigation of cases and controversies fully adjudicated by the federal courts. The Reviser's Notes to 28 U.S.C. § 2283 indicate that it was amended explicitly to overrule *Toucey; accord, Mitchum v. Foster*, 407 U.S. 225, 236 (1972). Thus, Justice Reed has been vindicated. He dissented in *Toucey* with the following words:

> [The] alternative [to allowing injunctions against relitigation] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.

314 U.S. at 144 (footnotes omitted).

Such words fit precisely the situation that confronted the federal district courts in *Choo, Zipfel, Villar* and *Ocean Ranger, supra.*

Another court considered the issue and put forth its thoughts as follows:

> In a case such as this it would be a disservice not only to the defendants, but also to the state judiciary, to allow the entire record to be placed in the lap of the New York State courts to be argued over by lawyers and puzzled over by judges for years to come. While comity requires respect for the ability of the state courts to decide the issue of *res judicata* properly, it also requires sympathy for their calendar problems and for the task that would confront them were this relitigation to be imposed upon them.
>
> *Browning Debenture Holders' Com. v. DASA Corp.*, 454 F.Supp. 88, 105 (S.D.N.Y.), *aff'd.* 605 F.2d 35 (2d Cir. 1978).

2. In Addition To The Relitigation Exception, The Aid Of Jurisdiction Exception In Section 2283 Applies.

The second exception in Section 2283 allows the court to enjoin state proceedings where necessary in aid of the federal court's jurisdiction. As noted by Professor Moore:

But the second exception in § 2283 embraces more than *in rem* cases . . . It is . . . meant to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, deal adequately with the situation at hand.

. . .

Under the Code of 1948 the doctrine of *forum non conveniens* is recognized and the federal district court is given the power to transfer an action to a proper, but more convenient forum. As a consequence of that power and because of the second exception in § 2283 a federal district court should be able to enjoin any proceedings that interfere with its decision as to whether the chosen federal forum is a proper one.

> 1A Pt. 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.208a(2) (2d ed. 1985).

In other words, it is well settled that a federal district court retains jurisdiction to enforce its judgments. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984): "A district court retains jurisdiction to enforce the judgment it enters." *See also In Re Ocean Ranger, supra*, 617 F.Supp. at 437; *Dugas v. American Surety Co. New York*, 300 U.S. 414 (1937). The court in *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977), held that an action for injunction to enforce a federal judgment is supplemental or ancillary, and therefore the jurisdiction follows that of the original suit. [2]

---

[2] Petitioners' reliance in footnote 9 of their brief (page 14) on *Vendo Co. v. Lektro- Vend Corp.*, 433 U.S. 623, *reh'g denied*, 434 U.S. 881 (1977), is misplaced because *Vendo* dealt with *parallel in personam* actions. The Court acknowledged that when judgment is rendered in the first action, the principles of *res judicata* will apply to the other still pending action. *Id.* at 641-42. In the present case of course, the Court is not faced with "parallel" federal and state actions. Rather, the federal action has proceeded to conclusion and thus has *res judicata* effect as to the issues actually decided.

B. The Arguments Raised By Petitioners Are Not Persuasive And, Except For The *Zipfel* Case, There Is No Legal Authority Supporting The Petitioners' Position.

Notwithstanding the many cases cited by petitioners, only one is factually identical to the case that is before this Court. That is the Ninth Circuit's conflicting decision in *Zipfel*.[3] Both cases present the scenario of foreign seamen bringing an action, in the first instance, in a United States district court under the Jones Act and general maritime law. Subsequently, after the district court has held that U.S. law does not apply and has dismissed the case on grounds of *forum non conveniens*, plaintiffs attempt to relitigate the identical cases all over again in state court in Texas.

Therefore, notwithstanding petitioners' arguments about federalism, comity and preemption, the facts are that, what Petitioner Musslewhite has done is create an unprecedented situation in which a federal injunction is not nearly so "intrusive" as petitioners would portray it. Rather, *Choo, Zipfel, Villar* and *Ocean Ranger, supra*, involve a federal court issuing an injunction to prevent relitigation between the same parties of a controversy and an issue that was fully and completely litigated before it and decided by it pursuant to a final federal judgment. The presence of the prior federal judgment is the crucial distinction between *Choo* (and *Zipfel, Villar* and *Ocean Ranger*), and the cases cited by petitioners.

Petitioners' theoretical discussions regarding possible differences between federal *forum non conveniens* and state law *forum non conveniens* are beside the point. Petitioners' argument is akin to arguing that they should be allowed to relitigate their cases because they do not like the federal rules of evidence and now would prefer to relitigate under the Texas state rules of evidence. To state the argument is to demonstrate its absurdity.

At sub-part IA (beginning at page 15 of petitioners' brief), petitioners argue that they should be allowed to relitigate their action in Texas state court because (according to the sub-heading

---

[3] The district court decisions in *Villar* and *Ocean Ranger, supra*, of course, are factually identical but are contrary to petitioners' position.

on page 15) the federal district court "never even considered, let alone decided, whether the Texas courts would have or could have entertained this case." Therefore, according to petitioners, the federal judgment has no preclusive effect. This is a very strange argument. It would require the prudent defendant wishing to bring a *forum non conveniens* motion to dismiss not only to raise, brief and argue the *forum non conveniens* law of the forum in which he may find himself sued, but also to raise, brief and argue the *forum non conveniens* law of every other jurisdiction in the United States (state and federal) in which he might conceivably be sued. This cannot be the law. Once again, plaintiffs chose the federal forum in the first instance. There should be some consequence attached to that choice.

Plaintiffs place great reliance on *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). However, that case is inapposite. There was no federal judgment to protect in *Atlantic Coastline*. *See* 398 U.S. at 293. In *Atlantic Coastline*, the Supreme Court rejected the district court's endeavor to function as a state appellate court, 398 U.S. at 293, 296. Neither Exxon here (nor Crowley in the *Zipfel* or *Villar* cases), asked the district court to assume the role of a state appellate court. What Exxon did was ask the district court to protect its duly considered judgment.

At page 20 of their brief, petitioners cite *State of Missouri Ex. Rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950) for the proposition that "state courts generally are free to decide *forum non conveniens* issues in accordance with their own standards, which may differ from those applied in federal courts." Nothing is wrong with that. But *State of Missouri Ex. Rel. Southern Ry. Co. v. Mayfield* did not involve a previous dismissal of the exact same case on grounds of *forum non conveniens*. The question is not whether or not Texas should be allowed to have any *forum non conveniens* doctrine. The issue is whether or not plaintiffs should be allowed to relitigate a federal *forum non conveniens* contest which they lost.

At page 24 of their brief, petitioners argue that the relitigation exception in Section 2283 applies only to "final resolution of the substantive merits of the case or controversy at issue." Presumably what petitioners mean is that, had Mrs. Choo litigated her case in the federal district court and had Exxon obtained a defense jury verdict after a complete trial, petitioners would not have had the audacity to start the whole process over again in state court. However, nothing in Section 2283 suggests that its exceptions are limited only to judgments entered after jury verdicts or after there has been a completed trial. Petitioners argue (on page 24) that the controversy in federal court should proceed to a point of "conclusive determination." This begs the question. The question is: conclusive determination of what? In the present cases, there was a conclusive determination that the United States was not the appropriate forum. It resulted in a final "judgment." Section 2283 by its terms applies to "judgments."

Would petitioners argue that a judgment of dismissal is not subject to Section 2283? What if a plaintiff's case was dismissed by the federal court and judgment entered on the grounds that the claim was time-barred by the applicable statute of limitations? Is the federal court without power to enjoin plaintiff from continually relitigating the time-barred claim?

Nothing in Section 2283, its legislative history or cases in aid of its interpretation indicates that a judgment of dismissal is entitled to any less respect or dignity than any other sort of federal judgment. *See*, for example, *Browning Debenture Holders' Com. v. DASA Corp.*, 454 F.Supp. 88, 105 (S.D.N.Y.), *aff'd.* 605 F.2d 35 (2d Cir. 1978) wherein plaintiff made certain claims against a bank in federal court which claims were dismissed before trial. Plaintiff then pursued the same claims in the state courts. The federal court was sustained in its issuance of an injunction against the state court relitigation.

Similarly, the court in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981) dismissed plaintiff's action in federal court on jurisdictional grounds and on the grounds that it failed to state a claim upon which relief could be granted. Dismissal was pursuant to a pretrial motion. The court issued a permanent injunction to prevent state relitigation of that action as well as litigation of a pending state court contract claim based upon the same physical act which gave rise to the federal cause of action. The Seventh Circuit affirmed and held that the

motion went to the merits for *res judicata* purposes even as to the pendent state court contract claim.

Furthermore, a strict application of *res judicata* is not necessary for the third exception in § 2283 to apply:

> The "effectuate its judgments" exemption (from the provisions of the anti-injunction statute) was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court . . . *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977). The relitigation exception . . . applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion is relied upon. *Ibid.* And this exception from the statute applies to interlocutory orders as well as final decrees. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 249 (2d Cir. 1961).
>
> *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268, 270 (S.D.N.Y. 1978).

Crowley agrees with petitioners (at page 25 of their brief) that the dissenting views expressed by Mr. Justice Reed in the *Toucey* case, *supra*, should be accorded deference. However, nowhere does Justice Reed indicate that he is limiting his comments to cases where there has been a final jury verdict. In fact, *Choo, Zipfel* and *Villar* did produce the "thousands of pages of evidence" referred to by Justice Reed.

At page 27 (Part IC) of their brief, petitioners argue that the issuance of the federal court injunction prevents "state courts from deciding for themselves whether matters are preempted by federal law" and cite *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511 (1955). This argument misses the mark for two reasons. First, no one is urging that some new judicially made exception to Section 2283 be invented, i.e. the so-called "preemption exception." Crowley would be quite content to rely upon the stated exceptions contained in Section 2283. Second, petitioners' reliance on *Amalgamated Clothing* is misplaced for the same reason that their reliance on *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, supra*, is misplaced. Specifically, in *Amalgamated* there was no prior federal judgment to protect.

Amalgamated involved an employer who filed a suit in state court to enjoin a union from picketing the employer's stores. The state court then denied the union's motion to dismiss the action on the ground that the NLRB had exclusive jurisdiction over the subject matter. The union then sought an injunction from the federal district court requiring the employer to dismiss the state court suit. As in *Atlantic Coastline*, the Supreme Court properly recognized that a district court's function is not to operate as a state appellate court and, since there was no prior federal judgment to protect, the injunction could not properly issue.[4]

In Part IIA of their brief on page 30, petitioners argue about a state's interest in determining its own *forum non conveniens* doctrine. Again, this misses the point. The facts of the present cases are that there has been a prior federal dismissal on grounds of *forum non conveniens* and a relitigation of exactly the same cases in the state system. The present cases are not ones in which a federal court has decided under some misguided notion of "preemption" to begin interfering in the orderly process of state judicial affairs. The federal court is merely trying to protect and effectuate its judgment and the defendants that were before it in

---

[4] In footnote 21, petitioners cite *Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960). But *Prack* was not an injunction case and therefore is inapposite. The Fourth Circuit in *Prack* held that, since the federal district court had no jurisdiction over the state court claim, it was without power to determine the jurisdiction of the state court. By contrast, here the federal court had jurisdiction over petitioners' claims. *Prack* does not address the issues that are before this Court, i.e. the power of a district court under Section 2283 to protect its judgments and preclude relitigation.

Domingo v. States Marine Lines, 340 F.Supp. 811 (S.D.N.Y. 1972), which is also cited by petitioners in note 21, was not an injunction case either and merely recognized that principles of *res judicata* may not apply to *forum non conveniens* decisions if the underlying actions are truly different. In the present case the underlying state and federal actions are identical.

the same case from having to go through the same exercise all over again in the state court.[5]

The basic thrust of the trial court judgments in *Chick Kam Choo, Zipfel* and *Villar* was that these federal district courts decided that the United States was an inappropriate forum and that the Far East was the preferable forum. Crowley acknowledges if, following these federal decisions, the plaintiffs had refiled their actions not in the Far East but in South America or Saudi Arabia or some other foreign jurisdiction which had legitimate contacts with the cause of action, the previous decision of the United States federal district court regarding the inappropriateness of the U.S. forum would have little if any, preclusive effect on whether or not the actions should properly be heard in South America or Saudi Arabia. However, that is a far cry from what has happened in *Choo, Zipfel* and *Villar*. Those plaintiffs have refiled again in the United States. In the *Zipfel* case, they were dismissed from the federal district court in San Francisco and refiled in state court in Texas. In both *Choo* and *Villar*, the cases were dismissed in federal district courts and then refiled in state courts in the very same cities in the United States in which the dismissing federal courts were located.

Crowley strenuously urges that prevention of such relitigation and protection of federal judgments does not unduly intrude on state affairs and is expressly permitted by 28 U.S.C. § 2283. It is petitioners' forum shopping and refusal to accept defeat that is

---

[5] At page 31, note 22 of their brief, petitioners refer to *Parsons v. Chesapeake & O. Ry. Co.*, 375 U.S. 71 (1963) (*per curiam*), for the proposition that principles of *res judicata* are not applicable to *forum non conveniens* decisions. *Parsons* was not an injunction case. The situation in *Parsons* was one where the defendant was endeavoring to use a prior state court *forum non conveniens* decision to prevent a federal district judge from exercising his powers under 28 U.S.C. § 1404(a) regarding transfer of actions between federal districts. *Forum non conveniens* dismissals and § 1404(a) transfers are entirely different exercises. *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 253 (1981), *reh'g denied*, 455 U.S. 928 (1982); *Veba-Chemie A.G. v. M/V GETAFIX*, 711 F.2d 1243, 1246 (5th Cir. 1983), *reh'g denied*, 724 F.2d 976 (5th Cir. 1984).

both an intrusion and an abuse of the state judicial system as well as a mockery of the federal judicial system.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment of the Fifth Circuit below be affirmed.

Respectfully submitted,

ERNEST N. REDDICK, III
(Counsel of Record)
REX M. CLACK
DERBY, COOK, QUINBY & TWEEDT
333 Market Street, Suite 2800
San Francisco, CA 94105
(415) 777-0505

Attorneys for Amicus Curiae
Crowley Maritime Corporation

DATED: February 19, 1988.

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-505

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

[redacted]
AMICUS CURIAE AND BRIEF AMICUS CURIAE

BURT BALLANFANT
SHELL OIL COMPANY
P. O. Box 2463
4794 One Shell Plaza
Houston, Texas 77252
(713) 241-7023

Counsel of Record

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE	1
CERTIFICATE OF SERVICE	3
ATTACHMENT A — Consent of Attorney of Petitioner for Filing of Amicus Curiae Brief	4
ATTACHMENT B — Consent of Attorney for Respondent for Filing of Amicus Curiae Brief	5
INTEREST OF AMICUS CURIAE	7
SUMMARY OF THE FACTS IN A SERIES OF LAWSUITS BETWEEN COSTA RICAN BANANA WORKERS AND DOW CHEMICAL COMPANY AND SHELL OIL COMPANY	8
ARGUMENT	14
CONCLUSION	20
CERTIFICATE OF SERVICE	20
APPENDIX	
APPENDIX A — Plaintiff's Original Complaint in *Sibaja, et al. v. Dow Chemical, et al.*, No. 83-14798, 11th Circuit Court, Dade County, Florida	1a
APPENDIX B — Motion to Dismiss or, in the Alternative, Motion to Transfer in *Sibaja, et al. v. Dow Chemical, et al.*, No. 83-1347-Civ-JLK, United States District Court for the Southern District of Florida	14a
APPENDIX C — Order Dismissing Cause in *Sibaja, et al. v. Dow Chemical, et al.*, No. 83-1347-Civ-JLK, United States District Court for the Southern District of Florida	26a
APPENDIX D — Plaintiff's Original Complaint in *Alfaro, et al. v. Dow Chemical Company, et al.*, No. 84-17171, 61st District Court, Harris County, Texas	33a
APPENDIX E — Partial Dismissal on Agreement in *Alfaro, et al. v. Sheel Oil Company*	50a
APPENDIX F — Order of Dismissal in *Alfaro, et al. v. Dow Chemical Company, et al.*, No. 84-17171, 61st District Court, Harris County Texas	58a

Page

APPENDIX G — Plaintiff's Original Complaint in *Aguilar, et al. v. Dow Chemical Company, et al.*, No. C570052, Los Angeles County Superior Court, California 61a

APPENDIX H — Order Vacating Order to Show Cause in *Aguilar, et al. v. Dow Chemical Company, et al.*, No. 86-4753 JGD (TX), United States District Court for the Central District of California 72a

APPENDIX I — Plaintiff's Original Complaint in *Cabalceta, et al. v. Standard Fruit Company, et al.*, No. 87-05102, 11th Circuit Court, Dade County, Florida 88a

APPENDIX J — Order on Motion to Remand, Motion to Dismiss, and Related Motions, in *Cabalceta, et al., v. Standard Fruit Company, et al.*, No. 87-0457-Civ-Atkins, in the United States District Court for the Southern District of Florida 128a

TABLE OF AUTHORITIES

CASES

Page

Aguilar, et al. v. Dow Chemical Company, et al., No. C570052, Los Angeles County Superior Court, California 12

Alexander, et al. v. Richardson, Merrill, Inc., 541 F.Supp. 93 (1982) 15

Alfaro, et al. v. Dow Chemical Company, et al., No. 84-17171, 61st Dist. Ct., Harris County, Texas 10, 11, 12

Alfaro, et al. v. Dow Chemical Company, et al., No. 01-87-00700-CV, First Court of Appeals, Texas 12

Cabalceta, et al. v. Standard Fruit Company, et al., No. 87-05102, 11th Circuit Court, Dade County, Florida 13, 14

Erie Railroad v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) 9

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987) 16, 17

Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2nd Cir. 1975), cert. denied, 423 U.S. 1052 (1976) 14

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 675 S. Ct. 839 (1947) 2, 16, 18, 19

CASES

Page

In Re Ocean Ranger, 617 F.Supp. 435 (D.C. La. 1985) .. 14

In Re Richardson-Merrill, Inc., 545 F.Supp. 1130 (S.D. Ohio 1982) 15

In Re Union Carbide Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2nd Cir. 1987) 16

Mizokami Bros. of Arizona, Inc. v. Mobil Chemical Corp., 660 F.2d 712 (8th Cir. 1981) 14, 15

Piper v. Reyno, 454 U.S. 235, 102 S. Ct. 252 (1981), reh. den. 455 U.S. 928, 102 S. Ct. 1296 (1982) 2, 16

Pastewka v. Texaco, Inc., 565 F.2d 851 (3rd Cir. 1977) ... 14, 19

Sibaja, et al. v. Dow Chemical, et al., No. 83-14798, 11th Circuit Court, Dade County, Florida 10

Sibaja, et al. v. Dow Chemical Company, et al., 757 F.2d 1215 (11th Cir. 1985) 9, 13

Sibaja, et al. v. Dow Chemical Company, et al., cert. denied, 474 U.S. 948, 106 S. Ct. 347 (1985) 10

Sperry Rand Corp. v. Rothkin, 288 F.2d 245 (2nd Cir. 1961) 18

UNITED STATES STATUTES

28 U.S.C. § 1404 ..... 2, 9, 15

28 U.S.C. § 1404(a) 15

28 U.S.C. § 1441 ..... 14, 17

28 U.S.C. § 1651 16

28 U.S.C. § 2283 .....16, 17, 18

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54 17

TEXTS

18 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction § 4226 (1981) 17

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Shell Oil Company hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for both petitioner and respondent has been obtained in writing and are attached to this motion as Attachments A and B.

The interest of Shell Oil Company is that it is a party to two cases: one in the Eleventh Circuit Court of Appeals and one in the First Court of Appeals for the State of Texas where the same issue is present—whether after a United States District Court has granted a forum non conveniens dismissal it can and should enjoin any further proceedings in state or federal courts in the United States.

In the instant case, the respondent's primary focus is on the interaction between federal maritime law and forum non conveniens; however, Shell Oil Company and Dow Chemical believe the concurring opinion of Chief Justice Clark in the Fifth Circuit articulates the correct rule of law and is a logical and appropriate extension of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 675 S. Ct. 839 (1947) and *Piper v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), reh. den. 455 U.S. 928, 102 S. Ct. 1296 (1982). The amicus curiae brief will describe in some detail how forum non conveniens is being handled practically in both state and federal courts in real life litigation, the inefficiency and waste of resources that creates, and will articulate what the amicus curiae believes is a logical common sense solution to the problems whch exist in this area.

Shell Oil Company (Shell) believes that foreign plaintiffs are manipulating the selection of the forum, the defendants named and served, and the removal statute to eviscerate this Court's rulings in *Gulf Oil Corp. v. Gilbert, supra,* and *Piper v. Reyno, supra.* Under the change of venue statute, 28 U.S.C. § 1404, Shell submits that in cases founded on diversity of citizenship the district where a case is filed may hear the case or transfer it in the interests of justice to the most convenient forum within the United States. If after reviewing the facts and legal arguments of that case, that court determines that a foreign forum is the most convenient forum for litigation of those claims then that finding should be given preclusive effect within the United States in both state and federal courts.

Accordingly, Shell requests this Court to accept their amicus curiae brief in this matter and to consider its argument which is articulated in the accompanying brief.

Respectfully submitted,

BURT BALLANFANT
SHELL OIL COMPANY
P. O. Box 2463
4794 One Shell Plaza
Houston, Texas 77252
(713) 241-7023

Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed, this 17th day of February, 1988.

BURT BALLANFANT

ATTACHMENT A

January 5, 1988

Mr. Burt Ballanfant
Shell Oil Company
Litigation Section - Legal Department
One Shell Plaza, Room 4794
Houston, TX 77001

Re: *Chick Kam Choo v. Exxon Corp.*,
No. 85-501
In the United States Supreme Court

Dear Mr. Ballanfant:

This is to advise you for purposes of complying with the Rules of the United States Supreme Court that as counsel for the plaintiff-petitioner in the above styled action that I have no objection to your filing an amicus curiae in the above captioned matter on behalf of Shell Oil Company and Dow Chemical Company

Very truly yours,

/s/ BENTON MUSSLEWHITE
Benton Musslewhite
609 Fannin, Suite 511
Houston, TX 77002
cc: James Patrick Cooney

ATTACHMENT B

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Attorneys At Law
2200 Texas Commerce Tower
Houston, Texas 77002
Area Code 713-224-8380
Cablegram "Houport"
Telex No. 762-648
Telecopier No. 713-225-9945

December 30, 1987

Benton Musslewhite, Esq.
Law Offices of Benton Musslewhite, Inc.
609 Fannin
Suite 511
Houston, Texas 77002

Chick Kam Choo v. Exxon Corporation
In the United States Supreme Court,
No. 85-505
Our File: 27,416

Dear Mr. Musslewhite:

As we advised by telephone, we have been contacted by representatives of the Maritime Law Association of the United States, the defendants in *Zipfel v. Halliburton, Inc.* and Shell Oil Company with regard to the possibility of their filing briefs *amicus curiae* in the above matter.

We have given our consent to the above request and would appreciate hearing from you with regard to whether Petitioners will likewise give their consent.

We look forward to hearing from you.

Very truly yours,

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

By: /s/ JAMES PATRICK COONEY
James Patrick Cooney

cc: Honorable Joseph F. Spaniol, Jr.
Clerk of the Supreme Court of
the United States
Office of the Clerk
Washington, D.C. 20543
ATTENTION: SANDY NELSEN,
ASSISTANT CLERK

cc: Joel Klein, Esq.
Onek, Klein & Farr
2550 "M" Street, N.W.
Suite 350
Washington, D.C. 20037

cc: John C. McHose, Esq.
Lillick, McHose & Charles
725 South Figueroa Street
Suite 1200
Los Anegeles, California 90017-2513

cc: Michael Marks Cohen, Esq.
Burlingham, Underwood & Lord
One Battery Park Plaza
New York, New York 10004

cc: Graydon S. Staring, Esq.
Lillick, McHose & Charles
Two Embarcadaro Center
San Fransico, California 94111

cc: Burt Bellafant, Esq.
Litigation Department
Shell Oil Company
P. O. Box 2463
Houston, Texas 77252

NO. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,
Petitioners,

v.

EXXON CORPORATION, et al.,
Respondents.

INTEREST OF AMICUS CURIAE

Amicus Curiae Shell Oil Company (Shell) is a corporation which has exported goods and services abroad and from time to time finds itself a party to litigation based on claims by foreign citizens. During the last five years, Shell has had first hand experience with a group of Costa Rican litigants who have repeatedly sought to litigate their claims in the United States. The repetitive reargument of essentially the same forum non conveniens issue in four different state and federal courts continues and has cost Shell significant expense, state and federal courts throughout the United States have experienced unnecessary disruption of their dockets, and has delayed

the resolution of the claims of these Costa Rican banana workers while they have pursued the allure of litigating their claims in the United States for over five years. For the reasons explained below, this Court could end muddles such as these and encourage prompt resolution of whether international claims should be brought in the United States as opposed to the appropriate foreign forum.

This amicus brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

SUMMARY OF THE FACTS IN A SERIES OF LAWSUITS BETWEEN COSTA RICAN BANANA WORKERS AND DOW CHEMICAL COMPANY AND SHELL OIL COMPANY

The history of litigation between a group of Costa Rican banana workers employed by Standard Fruit Company in Costa Rica and Shell Oil Company and Dow Chemical Company illustrates the compelling need for a national forum non conveniens standard and for a dismissal based on that standard to be given preclusive effect throughout the United States. On May 3, 1983, fifty-eight plaintiff Costa Rican banana workers and their wives filed an initial action in Dade County Circuit Court in Florida. None of these plaintiffs were residents of Florida; the cause of action arose not from exposure to a product in Florida but from claimed exposure to a chemical 1,2 dibromo 3 choloropropane (DBCP) on the Rio Frio Plantation of Standard Fruit Company in Costa Rica; moreover, neither Dow nor Shell were incorporated in Florida nor had their principal place of business in Florida. After the case was removed from Florida Circuit Court, Shell pursuant to 28 U.S.C. § 1404 filed a Motion to Transfer to the United States District Court for the Eastern District of Michigan simultaeously with a Motion to Dismiss on the basis of forum non conveniens. *Sibaja, et al. v. Dow Chemical, et al.*, No. 83-14798, 11th Circuit Court, Dade County, Fla. See Appendix A and Appendix B of this brief. The District Court for the Southern District of Florida never ruled on Shell's Motion to Transfer, thereby denying it *sub silentio*. Judge King considered plaintiffs' arguments that forum non conveniens was not recognized in Florida (a position to which defendants objected) and that under *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed 1188 (1938), the more restrictive Florida rule governing forum non conveniens should govern the United States District Court's consideration of forum non conveniens and granted defendants' Motion to Dismiss on the basis of forum non conveniens. See, Appendix C of this brief. The Eleventh Circuit Court of Appeals reviewed the District Court's forum non conveniens analysis as well as the *Erie* question and affirmed the lower court's opinion. *Sibaja, et al. v. Dow Chemical Company, et al.*, 757 F.2d 1215 (11th Cir. 1985). The plaintiffs filed a Petition for Certiorari to this Court which was denied. *Sibaja et al. v. Dow Chemical Company, et al.*, cert. denied 474 U.S. 948, 106 S.Ct. 347 (1985).

On April 11, 1984, while the *Sibaja* case was pending on appeal, eighty-two new and distinct Costa Rican banana workers from the same Rio Frio Plantation of Standard Fruit Company in Costa Rica represented by the same attorneys filed suit in Harris County District Court in Houston, Texas alleging almost identical claims against

three defendants: Dow, Shell, and Amvac Chemical Company (Amvac). *Alfaro, et al. v. Dow Chemical Company, et al.*, No. 84-17171, 61st Dist. Ct., Harris County, Texas. See, Appendix D of this brief. Dow removed the case to the Federal District Court for the Southern District of Texas on May 21, 1984. The Federal District Court remanded the case to Harris County District Court on November 30, 1984.

After the remand to Harris County District Court, both plaintiffs and defendants initiated vigorous discovery on the forum non conveniens issues. The detailed history of the *Alfaro* case discovery illustrates that the problems a domestic defendant faces of conducting discovery against foreign parties are not hypothetical but are real and demanding. This brief discussion illustrates the lengthy amount of time needed to obtain minimal discovery from foreign plaintiffs on a narrow issue in the litigation. After the case was remanded to Harris County District Court, Shell filed certain discovery requests on each plaintiff on November 14, 1985, in order to determine the factual basis for the Texas Court's jurisdiction. The plaintiffs filed a Motion for a Protective Order to this discovery on December 20, 1985. The District Court entered an Order compelling the plaintiffs to answer this discovery on February 28, 1986. An additional set of discovery directed toward jurisdictional issues was served on each plaintiff on February 3, 1986. On May 13, 1986, Shell filed a Motion for Imposition of Sanctions for failing to comply with the Court's Order of February 28, 1986. The hearing on that motion was cancelled based upon a representation by plaintiffs' attorneys that they would file answers by the time the deposition of a designated witness for Standard Fruit Company was taken.

The answers to those discovery requests had still not been received when that deposition was taken. After some minimal answers were filed by some of the plaintiffs but no answers by many of the plaintiffs, Shell filed a new Motion for Imposition of Sanctions on March 3, 1987. On April 13, 1987, in the face of Shell's Motion for Sanctions, forty-seven of the plaintiffs voluntarily dismissed their claims against the defendants. See Appendix E of this brief. Prior to that time, some of the plaintiffs attempted to cure some of the defects in their discovery responses. At the time the Alfaro case was dismissed by the district court, Shell had a Motion for Sanctions pending against the remaining plaintiffs for failing to have their answers in proper form for a foreign document, for having been filed too late, and for incompleteness. While this history is not directly pertinent to Mrs. Choo's claim, it establishes that burdens faced by defendants in obtaining proof from parties who live in foreign countries let alone third party witnesses are real and not merely hypothetical.

On June 24, 1986, the deposition of the person designated by Sandard Fruit Company as the most knowledgeable about the shipments and transportation of DBCP, was taken in Boca Raton, Florida. The most interesting testimony developed from these efforts was that Shell's DBCP product was never used at the Rio Frio Plantation of Standard Fruit Company and that as of the conclusion of the discovery taken in the *Alfaro* case, no Shell DBCP product had ever been traced to Costa Rica by plaintiffs. The same deposition testimony established that Amvac's DBCP product had reached Costa Rica but had been re-exported. Subsequent to that deposition, the plaintiffs

dismissed Amvac on September 5, 1986 in the *Alfaro* case, but continued to prosecute their case against Shell. Shell believes that the plaintiffs' decision not to dismiss Shell is because to dismiss Shell would make the case susceptible to being removed to Federal Court. On June 22, 1987, after three years of discovery and briefing solely on the forum non conveniens issues, the 61st District Court of Harris County, Texas, dismissed the case on the basis of forum non conveniens. See, Appendix F to this brief. The plaintiffs have appealed that Order to the First Supreme Judicial District of Texas. *Alfaro, et al. v. Dow Chemical Company, et al.*, No. 01-87-00700-CV, First Court of Appeals, Texas.

After the *Alfaro* case had been filed, another group of thirty-four plaintiffs from the same Rio Frio Plantation of Standard Fruit Company represented by the same attorneys sued Dow, Shell, and Amvac in the Superior Court for Los Angeles County, California. Following the deposition of the designated witness by Standard Fruit Co. in the *Alfaro* case, the plaintiffs dismissed Amvac on September 10, 1986. With the dismissal of the California resident from the case, Dow removed the case to the United States District Court for the Central District of California. *Aguilar, et al. v. Dow Chemical Company, et al.*, No. C570052 Los Angeles County Superior Court, California. See Appendix G of this brief. Following the removal, the plaintiffs amended their Complaint to add Dr. Charles Hine and Hine Laboratories, Inc. who are citizens of California. After attempting to add these parties, the plaintiffs filed a Motion to Remand. Judge Davies held the removal proper and granted the defendants' Motion to Dismiss on the basis of forum non conveniens. See, Appendix H to this brief.

The remaining case in this saga was filed on February 4, 1987 in Dade County, Florida. *Cabalceta, et al. v. Standard Fruit Company, et al.*, No. 87-05102, 11th Circuit Court, Dade County, Florida. See Appendix I to this brief. This case was filed on behalf of 212 plaintiffs which included all of the plaintiffs from *Sibaja, Alfaro,* and *Aguilar* plus some thirty-eight additional plaintiffs. In addition, the plaintiffs sued four new parties not named in the prior lawsuits: Standard Fruit Company, Standard Fruit and Steamship Company, Dole Fresh Fruit, and Castle and Cook, Inc., who plaintiffs alleged were residents of Florida. The defendants removed to the United States District Court for the Southern District of Florida. The plaintiffs filed a Motion to Remand arguing that the principal place of business of Standard Fruit Company and Dole Fresh Fruit was Boca Raton, Florida. Standard Fruit Company argued the Court lacked jurisdiction over it and that its principal place of business was other than Florida and Dole Fresh Fruit Company argued that it was a sham defendant.

The Court on July 21, 1987, after considering all the arguments, denied the plaintiffs' Motion for Remand and granted the defendants' Motion to Dismiss on the basis of forum non conveniens. See Appendix J to this brief. As this was the fourth attempt to prosecute a suit in the United States and the second suit for almost all the plaintiffs, the defendants asked the Court for an injunction against the plaintiffs enjoining them from filing any more suits as to these claims in the United States which was denied on October 16, 1987. The defendants who did not contest jurisdiction appealed that denial of the requested injunction to the United States Eleventh Cir-

cuit Court of Appeals for the Eleventh Circuit. *Cabalceta, et al. v. Standard Fruit Company, et al.*, No. 87-5709 (11th Cir. 1987).

ARGUMENT

Shell believes that this Court should determine the question of issue preclusion by judgments of United States District Courts which have granted dismissal under the doctrine of forum non conveniens. The facts of the litigation waged against Shell and Dow for five years by a common group of foreign claimants represented by the same attorneys whose claims arise from the same seminal facts demonstrate how inefficient and injudicious an approach to litigation will be allowed to flourish unless this Court grants the effect of issue preclusion to a ruling of a United States District Court as to forum non conveniens and authorizes federal courts to enforce their rulings through the granting of injunctive relief. This is especially appropriate since the only reason all of these cases are not in federal court is the capriciousness of the removal statute 28 U.S.C. § 1441.

This issue is one which is arising repeatedly in litigation in the United States brought by foreign nationals. See, discussion *supra;* compare *Mizokami Bros. of Arizona, Inc. v. Mobil Chemical Corp.*, 660 F.2d 712 (8th Cir. 1981) with *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2nd Cir. 1975), cert. denied, 423 U.S. 1052 (1976) and *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977); see also, *In Re Ocean Ranger*, 617 F.Supp. 435 (D.C. La. 1985). The majority view of lower courts appears tc support issue preclusion under concepts of *res judicata, Pastewka v. Texaco, Inc., supra* or collateral estoppel, *In Re Ocean Ranger, supra;* however, one court

has disagreed with these conclusions and recommended a different course of action to achieve the same result, see, *Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp., supra.* Shell believes that the practice they followed in *Sibaja, et al. v. Dow Chemical Co., et al., supra,* serves as the model of how these cases can be legitimately reconciled while implementing a sound judicial practice and doing so with a minimal burden on scarce judicial resources.

In *Sibaja,* Shell initially filed a Motion to Transfer the case pursuant to 28 U.S.C. § 1404(a) in conjunction with its Motion to Dismiss on the grounds of forum non conveniens which the District Court overruled *sub silentio.* See Appendix B to this brief. This request for transfer was similar to the transfer that was actually granted in *Alexander, et al. v. Richardson, Merrill, Inc.*, 541 F.Supp. 93, 96-99 (1982) and *In Re Richardson-Merrill, Inc.*, 545 F.Supp. 1130 (S.D. Ohio 1982). While not precisely handling the issue in this fashion, the Court in *Mizokomi Brothers of Arizona, Inc. v. Mobay Chemical Corp., supra* at 717-719 seems to recommend this course of action. Shell believes that the most convenient forum in the United States is established by one of three express or implied methods: (1) where foreign plaintiffs have selected a forum and the defendant does not object and the District Court accepts the venue of the case, as to that case that forum should be deemed the most convenient forum in the United States; e.g., *Sibaja, et al. v. Dow Chemical Co., et al., supra;* (2) where a case is transferred to a Federal District Court pursuant to 28 U.S.C. § 1404, that Court has been determined to be the most convenient in the United States, e.g., *In Re Richardson-Merrill, Inc., supra;* or (3) where the multi-district

litigation panel has transferred a body of litigation to a certain Court, that Court should be deemed the most convenient forum in the United States, e.g., *In Re Union Carbide Gas Plant Disaster at Bhopal, India,* 809 F.2d 195 (2nd Cir. 1987). Once the most convenient forum in the United States has been established by implied agreement or judicial order, then that forum can apply the public and private interest factors set out in *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), and reiterated and extended in *Piper Aircraft Company v. Reyno,* 454 U.S. 235, 102 S. Ct. 252, 70 L.Ed.2d 419 (1981), reh. den. 455 U.S. 928, 102 S. Ct. 1296 (1982).

In the event the case is dismissed under forum non conveniens based upon those factors, then the determination has been made that the foreign forum is superior to the most convenient forum in the United States. That determination should not be subject to repetitive relitigation in the federal or state courts of the United States when the most appropriate court to address the issue of forum non conveniens has determined that the foreign forum is better than the most convenient forum in the United States.

The remaining issue to be resolved by this Court is whether that determination can then be enforced by an injunction against litigation by plaintiffs in state court and/or the state courts themselves under the All Writs Statute, 28 U.S.C. § 1651, and is not barred from doing so under the Anti-Injunction Act, 28 U.S.C. § 2283.

Shell believes that federal courts should be empowered to issue injunctions such as the one issued by the District Court in *Exxon Corp. v. Chick Kam Choo, supra,* in order to effectuate the terms of a District Court's Order

of Dismissal. There is limited authority on this issue and to the extent that it exists it was thoroughly discussed in *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987). However, the Court of Appeals For the Fifth Circuit below and Professors Wright and Miller have articulated the belief that if the forum non conveniens issue remains essentially the same between the federal court and the state court, an order of dismissal on the basis of forum non conveniens is the equivalent of a judgment and issue preclusion is appropriate. See *Exxon Corp. v. Chick Kim Choo, supra,* and 18 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction § 4226, at 346 (1981). Rule 54, Federal Rules of Civil Procedure, defines a judgment as "a decree and any order from which an appeal can be taken." Congress passed 28 U.S.C. § 2283 just after Rule 54, Federal Rules of Civil Procedure, had been promulgated. There is every reason to believe that Congress when it passed the Anti-Injunction Act in the same year was using the term "judgment" with the same meaning as defined in Rule 54, Federal Rules of Civil Procedure. The Rule 54 definition would clearly encompass orders of dismissal. A dismissal on forum non conveniens is even more appropriately within that definition because except for the oddity of 28 U.S.C. § 1441 which does not permit removal if a defendant is a citizen of the state in which the action is brought, all cases between foreign plaintiffs and American defendants would be in federal court on the basis of diversity of citizenship. Essentially as suggested by Shell, the determination by the most convenient forum within the United States that the United States is not a convenient forum would be a final judgment that foreign plaintiffs could have no recovery *in the United*

States. That construction promotes finality of judicial determinations because it would preclude efforts by plaintiffs to manipulate the naming of defendants to avoid removal under diversity jurisdiction in order to avoid the preclusive effect of a federal court's determination of forum non conveniens. Shell's suggested interpretation which equates an order of dismissal with a final judgment is consistent with the few cases to attempt to define judgment in the context of 28 U.S.C. § 2283. *Sperry Rand Corp. v. Rothkin,* 288 F.2d 245 (2nd Cir. 1961).

An analysis of the forum non conveniens factors shows that there should be scant difference between federal courts and state courts on this issue. In *Gulf Oil Corp. v. Gilbert, supra,* the private factors to be considered were:

1. The relative ease of access to proof—this factor is the same in state and federal courts. It is arguable that ease of access to proof in a foreign forum is better in federal court than state court.
2. Availability of compulsory process for attendance of unwilling witnesses. This factor is the same in state and federal courts. Just as is the case with the first factor it is probably better in federal courts.
3. The cost of obtaining willing witnesses. This factor is the same in state and federal courts.
4. Possibility of a view of the premises. This factor is the same in state and federal courts.
5. All other practical problems. There is no reason to believe these would be different in state courts from federal courts.

In Gulf Oil Corp. v. Gilbert, supra, the public factors to be considered are:

1. Congestion of the Courts—This is potentially a different issue in state court than in federal court but in practical terms it is probably about the same in state and federal courts in the same geographic location. Formal analysis may suggest that it is actually better in the Federal Courts which in many jurisdictions are less congested; therefore, if the case adversely affects the congestion of the federal court docket it would create an even worse situation in state courts.
2. Imposition of jury duty on a forum which has no relation to the litigation. This is the same in state and federal courts.
3. The difficulty of applying foreign law. This is the same in state and federal courts and may be worse in state courts because they generally have less staff to analyze foreign law and to make translations if required.

Even a cursory review of the *Gilbert* factors shows that the case issues between state and federal court are essentially the same. Accordingly issue preclusion is in order as this is the kind of issue preclusion that the *Pastewka* Court felt was covered by the Restatement of Judgments in § 13 and to which Professors Wright and Miller felt that issue preclusion should apply.

CONCLUSION

Shell submits that this Court should apply a scheme whereby the most convenient forum in the United States should decide the initial forum non conveniens issue and then that Court should be allowed to effectuate its judgment through an injunction.

Respectfully submitted,

Burt Ballanfant

BURT BALLANFANT
SHELL OIL COMPANY
P. O. Box 2463
4794 One Shell Plaza
Houston, Texas 77252
(713) 241-7023

Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed, this 17th day of February, 1988.

Burt Ballanfant

BURT BALLANFANT

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CASE NO. 83-14798

PLAINTIFFS' ORIGINAL COMPLAINT
JURY TRIAL DEMANDED

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS,

ROBRETO CERDA AGUILAR and
SINAI TORRES ROSALES,

VICENTE FLORES VALVERDE and
MARIA MAYELA VEGA FIGUREROA,

BOLIVAR ARIAS MORA,

ALFONSO CAMPOS RODRIGUEZ and
MARIA JIMENEZ BENAVIDES,

JUAN BAUTISTA VASQUEZ and
MARIA ISABEL CHAVARRIA SALAS,

VICTOR SOLIS ROJAS and
ROSA BADILLA PEREZ,

MIGUEL CHAVARRIA ZUNIGA,

JOAQUIN ZAMORA ARRIETA

TACITO CAMPOS GARCIA and
YAMILETH NURIS VILLEGAS DIAZ,

SEGUNDO RODRIGUEZ RODRIGUEZ and
MARY ELIZONDO UMANA,

ELIECER ACOSTA MONTERO and
EMMA JIMENEZ RAMIREZ,

MANUEL CHAVES NUNEZ and
MIREYA RODRIGUEZ RODRIGUEZ,

CARLOS GARITA SANDI and
MELITINA GONZALES,

EDWIN GOMEZ CASTRILLO and
ODILI TORRES ACUNA,

MAGIN FERNANDEZ GARCIA and
PAULA CORTEZ GOMEZ,

NEFTALI ARAYA GARITA and
LEDA ESPINOZA GAMBOA,

MARGARITO ZUNIGA GUTIERREZ and
ANAIS SANCHEZ ROJAS,

DANIEL LORIA MORERA and
PETRA BERTA NAVARRETE TORRES,

MIGUEL ZUNIGA PENA and
MARIA DE LA CRUZ GONZALES GONZALES,

ISAIAS SANCHEZ RIVERA and
FIDELIA ALVARADO SOLORZANO,

AUGUSTO LEITON RODRIGUEZ and
MERCEDES RODRIGUEZ ARRIETA,

ANGEL LOBO ROJAS and
MARGOT VARELA RAMIREZ,

CASAMIRO LOPEZ SANDOVAL and
ALEJANDRINA VEGA VILLALOBOS,

JOSE SOSSA SOSSA and
FLORY ALFARO JIMENEZ,

ANTONIO GUTIERREZ ZUMBADO and
MARIA DE LOS ANGELES,

GERARDO PERAZA GARRO and
NELLY UMANA ARIAS,

ELIAS HERNANDEZ BADILLA,

BENEDICTO CAMPOS CORRALES,

MARIO SOLANO JIMENEZ,

BOLIVAR ARIAS MORA,

PEDRO JIMENEZ MURILLO,

JOSE GAMBOA RODRIGUEZ,

RODRIGO GARITA SANDI,

versus

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY

COME NOW Plaintiffs, and files this their Original Complaint against the Defendants and allege as follows:

1. This is an action for damages in excess of the sum of Five Thousand and No/100 ($5,000.00) Dollars.

2. Plaintiffs are citizens and residents of Costa Rica. The Defendants are doing business in, and are residents of Dade County, Florida. Therefore, venue is proper in Dade County under F.S.A. § 47.051.

3. Defendant DOW CHEMICAL COMPANY is a Delaware corporation qualified to transact business in the State of Florida. Service of process on such Defendant is predicated on F.S.A. § 48.081(3) and F.S.A. § 48.091. Defendant's resident agent for service of process pursuant

to § 48.091 is C. T. Corporation System, 8751 W. Broward Boulevard, Plantation, Florida 33324.

4. Defendant SHELL OIL COMPANY is a Delaware corporation qualified to transact business in the State of Florida. Service of process on such Defendant is predicated on F.S.A. § 48.081(3) and F.S.A. § 48.091. Defendant's resident agent for service of process pursuant to § 48.091 is C. T. Corporation System, 8751 W. Broward Boulevard, Plantation, Florida 33324.

5. This cause of action is predicated on products liability theories of strict liability, implied warranty and negligence, as more specifically alleged herein. The products complained of are nematocides containing the chemical dibromochloropropane, commonly known as DBCP. The product manufactured, sold and distributed by the Defendant DOW CHEMICAL COMPANY is marketed under the trade name "Fumizone." The product manufactured by the Defendant SHELL OIL COMPANY is marketed under the trade name "Nemagon."

6. Plaintiffs SAUL MUNOZ SIBAJA, ROBERTO CERDA AGUILAR, VICENTE FLORES VALVERDE, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ, JUAN BAUTISTA VASQUEZ, VICTOR SOLIS ROJAS, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA, SEGUNDO RODRIGUEZ RODRIGUEZ, ELIECER ACOSTA MONTERO, MANUEL CHAVES NUNEZ, CARLOS GARITA SANDI, EDWIN GOMEZ CASTRILLO, MAGIN FERNANDEZ GARCIA, NEFTALI ARAYA GARITA, MARGARITO ZUNIGA GUTIERREZ, DANIEL LORIA MORERA, MIGUEL ZUNIGA PENA, ISAIAS SANCHEZ

RIVERA, AUGUSTO LEITON RODRIGUEZ, ANGEL LOBO ROJAS, CASIMIRO LOPEZ SANDOVAL, JOSE SOSSA SOSSA, ANTONIO GUTIERREZ ZUMBADO, GERARDO PERAZA GARRO, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI, allege that they were exposed to Fumizone and Nemagon and, as a result thereof, have suffered serious and permanent personal injuries including, but not limited to, loss of reproductive function.

NEGLIGENCE

7. The illnesses and disabilities of said Plaintiffs are a direct and proximate result of the negligence of each Defendant in that said Defendants produced, sold and/or otherwise put into the stream of interstate and international commerce, DPCP-containing materials which the Defendants knew, or in the exercise of ordinary care ought to have known, were deleterious and highly harmful to said Plaintiffs' health and well being. The Defendants were negligent in one, some and/or all of the following respects, among others, same being the proximate cause of said Plaintiffs' illnesses and disabilities:

(a) In failing to adequately warn Plaintiffs of the dangerous characteristics of DBCP;

(b) In failing to provide Plaintiffs with information as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there were any, to protect Plaintiffs from being harmed and disabled by exposure to DBCP;

(c) In failing to place adequate warnings on the containers of said DBCP-containing materials to warn of the dangers to health of coming into contact with said DBCP;

(d) In failing to take reasonable precaution or exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and applying DBCP;

(e) In failing to develop and utilize a substitute material for DBCP in the aforesaid nematocides;

(f) In failing to test DBCP prior to releasing these products for sale; and

(g) In conceaning the results of any tests conducted on DBCP by Defendants, if in fact either Defendant ever tested its DBCP-containing products.

STRICT LIABILITY

8. All of the allegations contained in the previous paragraphs are realleged herein.

9. The DBCP-containing products that were used and applied by Plaintiffs were designed and manufactured by Defendants and subsequently sold, directly and indirectly, to the various employers of Plaintiffs. Said products left the hands of Defendants in a defective and unreasonably dangerous condition in the following respects:

(a) said DBCP-containing products did not contain an adequate and timely warning regarding the serious health health hazards associated with DBCP;

(b) said products did not contain an adequate and timely warning to the effect that protective equipment should be used when working with DBCP;

(c) said products were defectively designed in that they contained DBCP although a substitute for this chemical was available at all times material to this litigation.

(d) said products were defectively designed in that they did not contain an adequate and timely warning concerning the hazards of DBCP and the need for safety precautions when using DBCP;

(e) said products were unreasonably dangerous *per se*.

10. Each Defendant is and/or was engaged in the business of manufacturing and/or distributing such DBCP-containing products and these products, without substantial change in condition after they were sold, were a producing cause of the damages sustained by Plaintiffs.

11. Plaintiffs were unaware of the dangerous propensities of the products which rendered them unsafe for their intended use. Plaintiffs used the aforementioned products in a manner that was reasonably anticipated by the Defendants. Further, during the periods that said Plaintiffs were exposed to the products of the Defendants, said products were being utilized in a manner which was intended by Defendants.

IMPLIED WARRANTY

12. All of the allegations contained in the previous paragraphs are realleged herein.

13. The Defendants impliedly warranted that their DBCP-containing products were of good and merchantable quality and fit for their intended use.

14. The Plaintiffs would show that they worked in close proximity to the DBCP-containing products of the Defendants and their presence was known or ought to have

been reasonably anticipated by the Defendants. The implied warranty made by the Defendants that their aforesaid products were of a good and merchantable quality and were fit for their particular intended use was breached in that Plaintiffs' work with Defendants' products caused them to be exposed to DBCP and to be injured as a proximate result thereof.

EXEMPLARY DAMAGES

15. The Plaintiffs would show that the damages incurred as described herein were directly and proximately caused by the willful, malicious and intentional commission and omissions, conscious indifference, and utter disregard for the welfare of the said Plaintiffs on the part of the Defendants herein, their agents, servants, employees, managers, superintendants, supervisors, and officers in that they ignored and concealed evidence available to them which indicated that DBCP and DBCP-containing materials were harmful and deadly to persons coming in contact with said materials. Consequently, users of DBCP-containing products, such as Plaintiffs, were deprived of the opportunity of free choice as to whether or not to expose themselves to the DBCP-containing products manufactured by Defendants. Plaintiffs would show that as a result of the conduct of Defendants as aforesaid, they should be awarded an amount that would punish Defendants and act as a deterrent to Defendants and others from the commission of similar wrongs.

COMPENSATORY DAMAGES

16. As a direct and proximate result of Defendants tortious conduct as aforesaid, Plaintiffs, SAUL MUNOZ SIBAJA, ROBERTO CERDA AGUILAR, VICENTE

FLORES VALVERDE, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ, JUAN BAUTISTA VASQUEZ, VICTOR SOLIS ROJAS, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA, SEGUNDO RODRIGUEZ RODRIGUEZ, ELIECER ACOSTA MONTERO, MANUEL CHAVES NUNEZ, CARLOS GARITA SANDI, EDWIN GOMEZ CASTRILLO, MAGIN FERNANDEZ GARCIA, NEFTALI ARAYA GARITA, MARGARITO ZUNIGA GUTIERREZ, DANIEL LORIA MORERA, MIGUEL ZUNIGA PENA, ISAIAS SANCHEZ RIVERA, AUGUSTO LEITON RODRIGUEZ, ANGEL LOBO ROJAS, CASIMIRO LOPEZ SANDOVAL, JOSE SOSSA SOSSA, ANTONIO GUTIERREZ ZUMBADO, GERARDO PERAZA GARRO, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI, have developed sexual and reproductive abnormalities and other related conditions and have been damaged in the following particulars for all of which suit is herein brought:

(a) Said Plaintiffs have suffered great physical pain and mental anguish and will continue to suffer great pain of body and mind throughout their lifetime;

(b) Plaintiffs have incurred and will continue to incur hospital, medical, pharmaceutical and other expenses in the future due to their exposure to Defendants' aforesaid products;

(c) Plaintiffs suffer an extraordinarily increased likelihood of developing cancer as a result of their exposure to DBCP-containing products manufactured, sold and/or distributed by the named Defendants;

(d) Plaintiffs suffer an extraordinarily increased risk of genetic damage as a result of their exposure to Defendants' aforesaid products;

(e) Plaintiffs will suffer a loss of earning capacity due to their exposure to said DBCP-containing products;

(f) Plaintiffs will incur expenses for domestic help and nursing care in the future due to their exposure to Defendants' aforesaid products;

(g) Plaintiffs have lost the capacity to enjoy a full and normal life and will continue to suffer such loss in the future due to their exposure to Defendants' aforesaid products;

(h) Plaintiffs, SINAI TORRES ROSALES, ODILI TORRES ACUNA, PAULA CORTEZ GOMEZ, YAMILETH NURIS VILLEGAS DIAS, LEDA ESPINOZA GAMBOA, NELLY UMANA ARIAS, ANAIS SANCHEZ ROJAS, EMMA JIMENEZ RAMIREZ, PETRA BERTA NAVARRETE TORRES, MIREYA RODRIGUEZ RODIGUEZ, MARIA DE LA CRUZ GONZALEZ GONZALEZ, FIDELIA ALVARADO SOLORAZANO, MARIA JIMENEZ BENAVIDES, MERCEDES RODRIGUEZ ARRIETA, MARY ELIZONDO UMANA, MARGOT VARELA RAMIREZ, ROSA BADILLA PEREZ, MELITINA GONZALES, ALEJANDRINA VEGA VILLALOBOS, RAFAELA ARRIETA PORRAS, FLORY ALFARO JIMENEZ, MARIA MAYELA VEGA FIGUREROA, MARIA ISABEL CHAVARRIA SALAS and MARIA DE LOS ANGELES, have suffered and will continue to suffer the loss of their husbands' services, consortium, financial support and the care and comfort of their society because of their said injuries and disabilities, and said wives will incur expenses for

medical and nursing attention rendered to their said husbands in the future.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against the Defendants, and each of them, jointly and severally, for general and special damages and punitive damages, for their costs expended herein, and for interest on said judgment from the date thereof until paid, at the legal rate, and for such other and further relief, both at law and in equity, to which the Plaintiffs may show themselves justly entitled.

Respectfully submitted,

FREDERICK M. BARON &
ASSOCIATES
A Professional Corporation
1050 Dallas Fed. Savings Tower
Dallas, Texas 75225
(214) 369-3605

By: /s/ RUSSELL W. BUDD
Russell W. Budd

AND

ROBLES & ROBLES
Attorneys at Law
Suite 401
75 S.W. 8th Street
Miami, Florida 33130

By: ,'s/ LOUIS S. ROBLES
Louis S. Robles

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 83-14798

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Defendants.

COMES NOW, MANUEL QUINTANA, duly appointed process server in the above referenced case and files this his Affidavit of Service of the following items:

Complaint and Summons

Copy of Notice of Serving Interrogatories to DOW CHEMICAL COMPANY and SHELL OIL COMPANY. An Original and one copy of First Set of Interrogatories served on SHELL OIL COMPANY. One copy of Interrogatories served on DOW CHEMICAL COMPANY.

in the above captioned cased on, SHELL OIL COMPANY, and states:

1. That a copy of the foregoing items came into his hand on the 3rd day of May, 1980, and that he executed the same in Broward County, Florida at 1:35 P.M. on 5-3-83, by delivering a true copy of the original thereof

with date and hour of service thereon to: C.T. Corporation System, 8751 W. Broward Blvd., Plantation, Florida.

/s/ MANUEL QUINTANA

/s/ SUSANA SIVES
Notary Public

Subscribed and sworn to before me
this 3rd day of May, 1983.

My Commission Expires:

Notary Public State of Florida at Large
My Commission Expires Nov. 19, 1984
Bonded thru General Ins. Underwriters

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA

CASE NO. 83-1347-Civ-JLK

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Defendants.

MOTION TO DISMISS OR, IN ALTERNATIVE,
MOTION TO TRANSFER

COMES NOW the Defendant, SHELL OIL COMPANY, by and through its undersigned counsel, and files this Motion to Dismiss on the ground of forum non-conveniens and in the alternative files this further Motion to Dismiss for improper venue pursuant to § 1404(a) of Title 28 USC. The factors supportive of these alternative motions will be hereinafter set forth and supported by affidavits submitted herewith, if available, or to be followed as promptly as possible if currently unavailable. The determinative factors supportive of both motions are generally similar in nature, both in relationship to the private interest of the parties and the public interest. Such factors, as applied to the subject litigation, reflect the following:

1. Each individual plaintiff (exclusive of those who may be asserting derivative claims only) was allegedly exposed to one or both products complained of in Costa Rica, and alleges resulting injuries or damages occurring in Costa Rica. Each plaintiff is a citizen and resident of Costa Rica and an alien with respect to the United States.

2. Relevant and significant factors in the defense of the subject cause will include the following:

a. Identification of the particular product in use.

b. The place of alleged exposure, i.e. marketing, transportation, distribution or use.

c. Method of application and resulting exposure, i.e. use, inadvertent exposure through employment or as bystander.

d. Awareness of and/or reaction to warnings as to proper and appropriate use.

e. Causation between exposure and alleged injuries or damages.

f. Use of protective devices.

3. The foregoing factual circumstances will be determined by witnesses in the nature of the plaintiffs themselves, vendors and purchasers of the alleged product, employers, supervisors, co-employees, treating or examining physicians, hospital personnel, families and friends, all of whom are residents of Costa Rica.

4. Critical to portions of the foregoing factual circumstances will be documentary evidence in the nature of shipping records, purchase records, business records of employers, medical records and hospital records, all of which are situated, if available, in Costa Rica.

5. That compulsory process to obtain any and all of the foregoing evidence, through deposition, production or appearance at trial, is available only in Costa Rica and would be unavailable in the Southern District of Florida.

6. That were such evidence available through the voluntary appearances of potential witnesses in the Southern District of Florida, the cost involved therein would be significant and substantial if not prohibitive.

7. That those witnesses relating to the production, marketing and sale of the involved product at the principal place of business of this Defendant in Houston, Texas, will be as readily available to a forum within Costa Rica as Miami, Florida, at no greater if not less cost and expense.

8. That documentary production, as required, from this Defendant's principal place of business can be accomplished with equal ease and practicality within Costa Rica as Miami, Florida.

9. That this cause will be governed by the laws of Costa Rica pursuant to the Florida significant contact principle with which laws the courts of Costa Rica have far greater familiarly.

10. That the public interest relating to the Southern District of Florida with respect to the congestion of the docket and burdens upon local citizens serving as jurors are contraindicative to the resolution of disputes arising in foreign countries between aliens or citizens of a foreign country and citizens of states other than Florida.

11. That both Defendants are subject to and/or will submit to the jurisdiction of the judicial system within Costa Rica.

12. That the judicial system of Costa Rica recognizes both joint and several liability as to all joint tortfeasors including vicarious liability for acts of agents and employees and including strict liability of owners or operators of industrial facilities and further provides for the award of compensatory damages arising from either an intentional or negligent tort.

13. That in the defense of the subject litigation, pursuant to the potential liability of other parties in the nature of distributors, employers, supervisors or other persons or entities who may have a legal liability to one or more of the plaintiffs herein referable to their alleged use and/or exposure of the subject products, third party claims for contribution may well exist and can be asserted only through process issued and served in Costa Rica pursuant to the Costa Rican judicial system where such potential third party defendants reside and where the alleged causes of action supportive of such third party claims accrued.

Based on the foregoing factors, it affirmatively and clearly appears that the *private interests* of the parties, witnesses and this court including access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, service of third-party claims, costs of obtaining attendance of willing witnesses and familiarity with applicable law require that this cause be dismissed and litigated in Costa Rica, and the *public interests* relating to the congested docket of this Court and resulting local burden upon the citizenry of this district with respect to jury service require the dismissal of this cause.

Were this Court to deny the foregoing Motion to Dismiss or defer ruling thereon, as an alternative, this De-

fendant urges, pursuant to § 1404(a) of Title 28 USC, a transfer of this cause to U.S. District Court for the Eastern District of Michigan, Northern Division, upon the following grounds:

1. This action could have been brought in this proposed transferee forum in that the Defendant, DOW, has its principal place of business and is doing business therein, and the Defendant, SHELL is engaged in and doing business within the District.

2. That sources of proof in the nature of witnesses and documentary evidence of DOW pertaining to its product and the marketing thereof is available within the transferee district and will be more readily accessible than the Southern District of Florida.

3. That witnesses and documentary evidence pertaining to SHELL'S product although primarily within the State of Texas at its principal place of business in Houston will be equally available within the transferee district as within the Southern District of Florida.

4. The choice of law rule within the State of Florida is predicated upon the significant contact principle and pursuant thereto, the law of Costa Rica will apply. The transferee district will be equally capable of applying such foreign law as would the Southern District of Florida.

5. That the Southern District of Florida bears absolutely no relationship whatsoever to the cause of action, contains neither witnesses nor documents referable to the products involved herein or the alleged damage resulting from their use and would require all witnesses and all documentary evidence to be produced at a locale far

removed from the location of either such witnesses or documents.

6. The court docket of the Southern District of Florida in the nature of the known congestion is contraindicative to the resolution of this dispute between citizens and residents of a foreign country and corporations with their principal places of business within the States of Michigan and Texas.

7. That the community of South Florida from which jurors would be drawn for any trial of the subject protracted litigation has absolutely no relationship to the dispute, and it would be an undue burden to impose upon such community a trial of the obvious duration that would be required in a complex product liability case of this nature involving 58 claimants.

Based on the foregoing factors, it affirmatively and clearly appears as between the Southern District of Florida and the Eastern District of Michigan that the private interests of the parties, witnesses and the court including access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, costs of obtaining attendance of willing witnesses and familiarity with applicable law requires that this cause be transferred to the Eastern District of Michigan and the public interests relating to the congested docket of this Court and the resulting local burden that would be imposed upon the citizenry of this district absent any local interest in the dispute whatsoever further requires the transfer of this cause to the Eastern District of Michigan.

WE HEREBY CERTIFY that a copy of the above and foregoing was mailed this 2nd day of June, 1983, to the attorneys on the attached list.

FOWLER, WHITE, BURNETT,
HURLEY, BANICK &
STRICKROOT, P.A.
Attorneys for Shell Oil Co.
25 W. Flagler St.
Miami, Florida 33130
(305) 358-6550

By: /s/ HENRY BURNETT
Henry Burnett

STATE OF FLORIDA)
: SS:
COUNTY OF DADE)

BEFORE ME, the undersigned authority personally appeared, HENRY BURNETT, who, being duly sworn deposes and says:

1. That he is a member of the firm of FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., attorneys of records for SHELL OIL COMPANY herein, and upon information and belief, the factual information set forth above is true and correct.

FURTHER AFFIANT SAYETH NOT.

/s/ HENRY BURNETT
Henry Burnett

Sworn to and subscribed
before me this 2nd day
of June, 1983.
/s/ GLORIA M. KIGUES
NOTARY PUBLIC, State of
Florida at Large

My Commission Expires: February 5, 1984.

Bonded thru Maynard Bonding Agency

LIST OF COUNSEL

Frederick M. Baron, Esq.
FREDERICK M. BARON & ASSOCIATES
1050 Dallas Federal Savings Tower
Dallas, Texas 75225

Attorneys for Plaintiffs

Louis S. Robles, Esq.
ROBLES & ROBLES
Suite 401
75 S.W. 8th Str.
Miami, Florida 33130

Attorneys for Plaintiffs

Edward Corlett, Esq.
CORLETT, KILLIAN, HARDEMAN,
McINTOSH & LEVI
116 West Flagler Street
Miami, Florida 33130

Attorney for Defendant, DOW CHEMICAL CO.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA

CASE NO. 83-1347-Civ-JLK

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Defendants.

AFFIDAVIT

STATE OF FLORIA)
ss.
COUNTY OF DADE)

CHARLES G. DeLEO, a member of the law firm of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., gives the following Affidavit:

I, CHARLES G. DeLEO, swear that I am an attorney, educated in civil law, having studied law in a civil law jurisdiction. I have personally researched the laws of Costa Rica, and translated them from Spanish to English. I am both fluent in Spanish, and have familiarity with the legal systems of the Latin American States, having been employed by a law office in Latin America. I am currently a member of the Florida Bar.

I have reviewed the motion and memorandum of Shell Oil Company to dismiss or in the alternative to transfer, said motion dated June 2, 1983, and the representations therein pertaining to the fact and substance of Costa Rican law are true and accurate.

/s/ CHARLES G. DeLEO
Charles G. DeLeo

SWORN TO AND SIGNED in my presence this 2nd day of June, 1983.

/s/ SUSAN A. WAXMAN
NOTARY PUBLIC,
State of Florida

My commission expires: September 9, 1988.

Bonded thru Maynard Bonding Agency

CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that a true and correct copy of the above and foregoing Affidavit of Charles G. DeLeo was mailed this 2nd day of June, 1983, to: Frederick M. Baron, Esq., Frederick M. Baron & Assoc., 1050 Dallas Federal Savings Tower, Dallas, Texas 75225; Louis S. Robles, Esq., Robles & Robles, Suite 401, 75 S.W. 8th Street, Miami, Florida 33130 and Edward Corlett, Esq., 116 West Flagler Street, Miami, Florida 33130.

FOWLER, WHITE, BURNETT,
HURLEY, BANICK &
STRICKROOT, P.A.
Attorneys for Shell Oil Co.
501 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
TEL: 305/358-6550

By: _____
Thomas F. Martin

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1347-CIV-JLK

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY

ORDER DISMISSING CAUSE

THIS CAUSE comes before the Court upon the Defendants' Motions to Dismiss.

In support of their motions to dismiss the Defendants have argued that this cause should be dismissed on the ground of forum non conveniens. In support of that argument, they have asserted:

1. that each individual plaintiff was allegedly exposed to the product in question in Costa Rica;

2. that the evidence and witnesses, including all of the 58 Plaintiffs, are primarily located in Costa Rica;

3. that most of this evidence and these witnesses would not be subject to the compulsory process of this Court;

4. that even if such evidence and witnesses were made available voluntarily, the cost involved would be substantial;

5. that the witnesses and evidence within the United States are in places other than the Southern District of Florida and so would be just as obtainable in Costa Rica as in Florida;

6. that the Florida law of conflicts would apply the Costa Rican substantive law, which is in a foreign language unfamiliar to this Court;

7. that this cause of action has no contact with the Southern District of Florida and that the Public interest in providing a forum in Florida is out weighed by the costs of court congestion and jury duty;

8. that the judicial system of Costa Rica does provide a forum and a remedy for the Plaintiffs and both Defendants are subject to the jurisdiction of the Costa Rican judicial system or will submit to that jurisdiction;

9. and, that the application of the doctrine of forum non conveniens is within the sound discretion of the Court.

For support of their argument, the Defendants rely on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

In their response to the motion to dismiss the Plaintiffs' argue that a major objective of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was to avoid the unequal administration of the laws and the forum shopping that had previously been caused by the diversity jurisdiction

of the Federal Courts. The Plaintiffs argue that to facilitate this objective the *Erie* Court attempted to minimize the variations between state and federal law as it would be applied in diversity cases. The argument then asserts that under Florida law this action could not be dismissed on the ground of forum non-conveniens because the Defendants are residents of Florida.

Because the doctrine of forum non-conveniens would not be available in this case if it were in State Court the Plaintiffs' would have this Court distinguish this case from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), relied on by the Defendants, and then applying the Florida Law of forum non-conveniens. The distinction that the Plaintiffs would have this Court make is that in *Piper* the state law of forum non conveniens was the same as the federal law of non conveniens while that is not the situation here.

The Court, having considered the arguments of the parties and being fully advised, finds that the law as stated in *Piper Aircraft*, 454 U.S. 235, and *Gilbert*, 330 U.S. 501, governs this case. The Court finds further that application of the factors listed in *Piper Aircraft* and *Gilbert* to the case at bar requires that the motions to dismiss be granted.

The doctrine of *forum non conveniens* is simply a tool that a court may use to resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of the law. General venue statutes are generally drawn to allow a plaintiff a choice of forums and Plaintiffs may be tempted to abuse their right to choose. *Gilbert*, 330 U.S. at 507. While the Plaintiffs choice of forums is usually assumed to be a convient forum, that assumption is less reasonable and entitled to less weight when the Plaintiff

is foreign. *Piper Aircraft*, 102 S. Ct. at 266. The determination of the *forum non conveniens* question is within the sound discretion of the trial court and when it is based on a reasonable consideration of the *Gilbert* factors, it will not be disturbed. *Piper Aircraft*, 102 S. Ct. at 266.

The pertinent factors for consideration, as detailed in *Gilbert*, are:

1. the private interests of the litigants:
   a. the relative ease of access to sources of proof;
   b. availability of compulsory process for attendance of unwilling witnesses;
   c. the cost of obtaining the attendance of witnesses;
   d. the possibility of viewing the premises concerned;
   e. and, all other practical problems that make trial of a case easy, expeditious and inexpensive;
2. the public interest:
   a. congestion of the court docket;
   b. the burden of jury duty for a case that has little or no relation to the community;
   c. the application of the law by a forum that is familiar with the law which governs the case.

Gilbert, 330 U.S. at 508.

In addition, the Court in *Piper Aircraft* considered the availability of an alternative forum that could exercise jurisdiction and offer the Plaintiffs a remedy; the inability to implead potential third party defendants in one jurisdiction; and, the added burden imposed on the Defendant as compared to the added convenience to be realized by the Plaintiffs. 102 S. Ct. 252.

Applying these considerations to the case at bar, the Court finds that the considerations overwhelming weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occurred in Costa Rica. All the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action in Florida. And, as was the case in *Piper Aircraft*, the Plaintiffs have not offered any specific reason showing the convenience of their choice.

As to the public interest factors, this case is essentially fifty eight different law suits with different elements of damages, negligence, contributory negligence etc. It could not help but congest this Court's docket more than it would that of a Court at the situs of the injury simply because of the logistics of dealing with fifty eight different Plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of *forum non conveniens*. *Piper Aircraft*, 102 S. Ct. at 263. It would require local jurors to hear and decide a dispute that has no connection with this community. And, finally, the Defendants have asserted that Costa Rica offers the Plaintiffs an alternative forum with an adequate remedy, an assertion that has not been rebutted by the Plaintiffs.

The Plaintiffs contend that this Court must allow further discovery before it decides the issue of *forum non conveniens*. But the Court in *Piper Aircraft* found that a detailed inquiry into the facts was not necessary and, in fact would defeat the purpose of the doctrine. 102 S. Ct. at 267. As in *Piper Aircraft*, the Defendants here have moved for dismissal precisely because many crucial witnesses are located beyond the reach of the compulsory process of this Court and are thus difficult to identify or interview. The record contains the unrebutted allegations of the Defendants as to the difficulties caused by this choice of forum as well as affidavits substantiating such difficulties, this information is sufficient for the Court to adequately consider the *Gilbert* and *Piper Aircraft* factors.

As to the Plaintiffs' contention that state law should apply, the Court agrees with the statement of the United States District Court for the Southern District of Ohio in *in re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D. Ohio 1982):

> [G]iven the discretionary nature of the *forum non conveniens* inquiry and the factors established by the Supreme Court to guide such a determination, it would appear anomalous for the Court to apply anything but federal principles.

545 F.Supp. at 1132.

And:

> Most of the 'public interest factors' affecting the convenience of the forum relate peculiarly to the *court* in which the case is pending, rather than to the state in which the federal court is located.

id. at n.3.

Accordingly, the Court does:

ORDER and ADJUDGE that the Defendants' Motions be, and they are GRANTED. This cause is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 25th day of August, 1983.

/s/ JAMES LAWRENCE KING
James Lawrence King
U. S. District Judge

cc: all counsel

APPENDIX D

NO. 84-17171

IN THE DISTRICT COURT
FOR THE COUNTY OF HARRIS
113TH JUDICIAL DISTRICT

(Filed April 11, 1984)

DOMINGO CASTRO ALFARO;

ISMAIL CAMPOS ALPIZAR and
DEYANRA CORDERO ALVARADO;

OVIDIO MORERA ALVARADO and
FLORINDA ROJAS DURAN;

ALVARO MORERA ALVAREZ and
JEREMY MORERA LOPEZ;

JESUS HERNANDEZ BADILLA and
ELIDIETH ROMAN AZOFEIFA;

EDWIN LEON BARBOZA, ET. UX.;

EFRAIM HERRA BARBOZA;

WALDEMAR LOAIZA CALVO;

EDURADO PEREZ CAMPOS and
LUZ MARINA CAMPOS RODRIGUEZ;

CLAUDIO SALAZAR CARBALLO and
DELEFINA ALMANZA PEREZ;

JORGE VAZQUEZ CARRILLO and
NOEMY SALINAS SALINAAS;

EFRAIN NUNEZ CASTRO, ET. UX.;

JOEL DINARTE CASTRO;

JORGE CASTRO CASTRO and
NURY BARBOZA MORA;

SERGIO ZAMORA CASTRO and
CLARA MARIA CHAVEZ VARGAS;

ALCIBIADES NUNEZ CESPEDES and
MARIA ESTER MONTERO BOGANTES;

MIGUEL ANGEL STELLAR CHAVES and
MARIA DEL SOCORRO SANCHEZ OSES;

DIDIER ARIAS ELIZONDO and
IRENE BARRERA CHAVARRIA;

GREGORIA PEREZ ESPINOZA and
TERESA SANCHEZ ADOLIO;

SIGIFREDO MORALES ESPINOSA;

FRANCISCO ARIAS FALLAS and
MARITZA GOMEZ PEREZ;

RIGOBERTO GARITA GARITA and
MARIA CRISTINA CRUZ MARTINEZ;

MANUEL GOMEZ GOMEZ and
DEYANIRA ENRIQUEZ QUEVARA;

ANGEL SOLANO GONZALES and
LUZ RODRIGUES RAMIREZ;

FRANCISCO MORERA GONZALEZ and
ELOISA RAMIREZ CAMPOS;

MARCIANO SOLANO GONZALEZ and
FLORA ELENA FERNANDEZ ROBLES;

ANDRES VEGA GRANADOS and
MARTA JIMENEZ GONZALES;

ALFREDO BERMUDEZ HERNANDEZ and
MARIA LUISA BERMUDEZ ORDONEZ;

JUAN FIGUEROA MATARRITA and
MIREYA PEREZ PEREIRA;

URIEL NUNEZ MOYA and
MIRIAM CARTIN ARAYA;

ELI ORDONEZ MURILLO and
NATIVIDAD ROBLES DURATES;

ISMAEL SALAS NUNEZ and
BASELISA MEDINA MATARRITA;

ANTONIO VILLALOBOS ORTIZ and
MARITZA SOSSA SOSSA;

JORGE VEGA PEREZ;

CARLOS LUIS MUNOZ RAMIREZ;

FRANCISCO RAMIREZ RAMIREZ and
XINIA VINDAS CASTILLO;

VICENTE GUEVARA REYES and
MARIA CECILIA DURAN CORRALES;

GERARDO ESPINOZA RODRIGUEZ;

DANIEL ZUMBADO SALAS and
LEDA MARIA ROSALES ROSALES;

MARIO ZUMBADO SALAS and
ORLENDIA CASCANTE NAVARRO;

RUBEN MORALES SALAZAR and
BLANCA NIEVES ARIAS QUESADA;

ABELINO ROJAS SEQUEIRA;

JOSE OBANDO SEQUEIRA and
JUDITH CAMPOS GONZALEZ;

JOSE SIBAJA SOTA and
BLANCA NIEVES CASCANTE NAVARRO;

ELEI ELIZONDO UMANA and
ROSALIA SOLANO GONZALEZ;

JUAN ELIZONDO UMANA;

ARNOLDO GALLO VALLEJOS;

MANUEL FLORES VALVERDE
Plaintiffs,

v.

DOW CHEMICAL COMPANY,
SHELL OIL COMPANY and
AMVAC CHEMICAL CORPORATION,
Defendants.

PLAINTIFF'S ORIGINAL PETITION

COME NOW the above-referenced Plaintiffs complaining of the Defendants SHELL OIL COMPANY, DOW CHEMICAL COMPANY and AMVAC CHEMICAL CORPORATION and for cause of action would show the Court and jury as follows:

1. Plaintiffs are residents of Costa Rica. Defendant SHELL OIL COMPANY has its principal offices in Harris County and, therefore, venue lies against all Defendants in Harris County.

2. Defendant, SHELL OIL COMPANY is a Delaware corporation with its principal place of business in Texas; said corporation may be served through its registered agent, C. T. Corporation, 811 Dallas Avenue, Houston, Texas 77002.

3. Defendant, DOW CHEMICAL COMPANY, is a Delaware corporation with its principal place of business in a state other than Texas; said corporation may be served through its registered agent, C. T. Corporation System, Republic National Bank Building, Dallas, Texas 75210.

4. Defendant, AMVAC CHEMICAL CORPORATION, is a California corporation with its principal place of business in a state other than Texas. Although Defendant, AMVAC CHEMICAL CORPORATION, does business within the State of Texas and is required to maintain a registered agent for service of process, said Defendant has not designated such an agent and may, therefore, be served at its corporate headquarters, 4100 E. Washington Boulevard, Los Angeles, California 90023 pursuant to TEX. R. CIV. STAT. ANN. art. 2031(b) and TEX. R. CIV. P. 108.

5. This cause of action is predicated on products liability theories of strict liability, implied warranty and negligence, as more specifically alleged herein. The products complained of are nematocides containing the chemical dibromochloropropane, commonly known as DBCP. These products were manufactured, sold and distributed by the Defendants DOW CHEMICAL COMPANY, SHELL OIL COMPANY and AMVAC CHEMICAL CORPORATION.

6. Plaintiffs, DOMINGO CASTRO ALFARO, ISMAIL CAMPOS ALPIZAR, OVIDIO MORERA ALVARDO, ALVARO MORERA ALVAREZ, JESUS HERNANDEZ BADILLA, EDWIN LEON BARBOZA, EFRAIM HERRA BARBOZA, WALDEMAR LOAIZA CALVO, EDUARDO PEREZ CAMPOS, CLAUD-

IO SALAZAR CARBALLO, JORGE VASQUEZ CARRILLO, EFRAIN NUNEZ CASTRO, JOEL DINARTE CASTRO, JORGE CASTRO CASTRO, SERGIO ZAMORA CASTRO, ALCIBIADES NUNEZ CESPEDES, MIGUEL ANGEL STELLER CHAVES, DIDIER ARIAS ELIZONDO, GREGORIA PEREZ ESPINOZA, SIGIFREDO MORALES ESPINOZA, FRANCISCO ARIAS FALLAS, MARITA GOMEZ PEREZ, RIGOBERTO GARITA GARITA, MANUEL GOMEZ GOMEZ, ANGEL SOLANO GONZALES, FRANCISCO MORERA GONZALEZ, MARCIANO SOLANO GONZALEZ, ANDRES VEGA GRANADOS, ALFREDO BERMUDEZ HERNANDEZ, JUAN FIGUEROA MATARRITA, URIEL NUNEZ MOYA, ELI ORDONEZ MURILLO, ISMAEL SALAS NUNEZ, ANTONIO VILLALOBOS ORTIZ, JORGE VEGA PEREZ, CARLOS LUIS MUNOZ RAMIREZ, FRANCISCO RAMIREZ RAMIREZ, VICENTE GUEVARA REYES, GERARDO ESPINOZA RODRIGUEZ, DANIEL ZUMBADO SALAS, MARIO ZUMBADO SALAS, RUBEN MORALES SALAZAR, ABELINO ROJAS SEQUEIRA, JOSE OBANDO SEQUEIRA, JOSE SIBAJA SOTA, ELEI ELIZONDO UMANA, JUAN ELIZONDO UMANA, ARNOLDO GALLO VALLEJOS and MANUEL FLORES VALVERDE, allege that they were exposed to these products in Costa Rica and, as a result thereof, have suffered serious and permanent personal injuries including, but not limited to, sterility.

NEGLIGENCE

7. The illnesses and disabilities of the Plaintiffs, DOMINGO CASTRO ALFARO, ISMAIL CAMPOS ALPIZAR, OVIDIO MORERA ALVARDO, ALVARO

MORERA ALVAREZ, JESUS HERNANDEZ BADILLA, EDWIN LEON BARBOZA, EFRAIM HERRA BARBOZA, WALDEMAR LOAIZA CALVO, EDURADO PEREZ CAMPOS, CLAUDIO SALAZAR CARBALLO, JORGE VAZQUEZ CARRILLO, EFRAIN NUNEZ CASTRO, JOEL DINARTE CASTRO, JORGE CASTRO CASTRO, SERGIO ZAMORA CASTRO, ALCIBIADES NUNEZ CESPEDES, MIGUEL ANGEL STELLER CHAVES, DIDIER ARIAS ELIZONDO, GREGORIA PEREZ ESPINOZA, SIGIFREDO MORALES ESPINOZA, FANCISCO ARIAS FALLAS, MARITZA GOMEZ PEREZ, RIGOBERTO GARITA GARITA, MANUEL GOMEZ GOMEZ, ANGEL SOLANO GONZALES, FRANCISCO MORERA GONZALEZ, MARCIANO SOLANO GONZALEZ, ANDRES VEGA GRANADOS, ALFREDO BERMUDEZ HERNANDEZ, JUAN FIGUEROA MATARRITA, URIEL NUNEZ MOYA, ELI ORDONEZ MURILLO, ISMAEL SALAS NUNEZ, ANTONIO VILLALOBOS ORTIZ, JORGE VEGA PEREZ, CARLOS LUIS MUNOZ RAMIREZ, FRANCISCO RAMIREZ RAMIREZ, VICENTE GUEVARA REYES, GERARDO ESPINOZA RODRIGUEZ, DANIEL ZUMBADO SALAS, MARIO ZUMBADO SALAS, RUBEN MORALES SALAZAR, ABELINO ROJAS SEQUEIRA, JOSE OBANDO SEQUEIRA, JOSE SIBAJA SOTA, ELEI ELIZONDO UMANA, JUAN ELIZONDO UMANA, ARNOLDO GALLO VALLEJOS and MANUEL FLORES VALVERDE, are a direct and proximate result of the negligence of each Defendant in that said Defendants produced, sold and/or otherwise put into the stream of commerce, DBCP-containing materials which the Defendants knew, or in the exercise of ordinary care ought to have known, were deleterious and highly

harmful to said Plaintiffs' health and well being. The defendants were negligent in one, some and/or all of the following respects, among others, same being the proximate cause of said Plaintiffs' illnesses and disabilities:

(a) In failing to adequately warn Plaintiffs of the dangerous characteristics of DBCP;

(b) In failing to provide Plaintiffs with information as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there were any, to protect Plaintiff from being harmed and disabled by exposure to DBCP;

(c) In failing to place adequate warnings in Spanish on the containers of said DBCP-containing materials to warn of the dangers to health of coming into contact with said DBCP;

(d) In failing to take reasonable precaution or exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and applying DBCP;

(e) In failing to develop and utilize a substitute material for DBCP in the aforesaid nematocides;

(f) In failing to test DBCP prior to releasing these products for sale; and

(g) In concealing the results of any tests conducted on DCPB by Defendants, if in fact any Defendant ever tested its DBCP-containing products.

STRICT LIABILITY

8. All of the allegations contained in the previous paragraphs are realleged herein.

9. The DBCP-containing products that were used and applied by Plaintiff were designed and manufactured by Defendants and subsequently sold, directly and indirectly, to the various employers of Plaintiffs. Said products left the hands of Defendants in a defective and unreasonably dangerous condition in the following respects:

(a) said DBCP-containing products did not contain an adequate and timely warning regarding the serious health health hazards associated with DBCP;

(b) said products did not contain an adequate and timely warning to the effect that protective equipment should be used when working with DBCP;

(c) said products were defectively designed in that they contained DBCP although a substitute for this chemical was available at all times material to this litigation;

(d) said products were defectively designed in that they did not contain an adequate and timely warning concerning the hazards of DBCP and the need for safety precautions when using DBCP;

(e) said products were unreasonably dangerous *per se*.

10. Each Defendant is and/or was engaged in the business of manufacturing and/or distributing such DBCP-containing products and these products, without substantial change in condition after they were sold, were a producing cause of the damages sustained by Plaintiffs.

11. Plaintiffs were unaware of the dangerous propensities of the products which rendered them unsafe for their intended use. Plaintiffs used the aforementioned products in a manner that was reasonably anticipated

by the Defendants. Further, during the periods that said Plaintiffs were exposed to the products of the Defendants, said products were being utilized in a manner which was intended by Defendants.

IMPLIED WARRANTY

12. All of the allegations contained in the previous paragraphs are realleged herein.

13. The Defendants impliedly warranted that their DBCP-containing products were of good and merchantable quality and fit for their intended use.

14. The Plaintiffs would show that they worked in close proximity to the DBCP-containing products of the Defendants and their presence was known or ought to have been reasonably anticipated by the Defendants. The implied warranty made by the Defendants that their aforesaid products were of a good and merchantable quality and were fit for their particular intended use was breached in that Plaintiffs' work with Defendants' products caused them to be exposed to DBCP and to be injured as a proximate result thereof.

EXEMPLARY DAMAGES

15. The Plaintiffs would show that the damages incurred as described herein were directly and proximately caused by the reckless and grossly negligent commissions and omissions, conscious indifference, and utter disregard for the welfare of the said Plaintiffs on the part of the Defendants herein, their agents, servants, employees, managers, superintendants, supervisors, and officers in that they ignored and concealed evidence available to them which indicated that DBCP

and DPCP-containing materials were harmful and deadly to persons coming in contact with said materials. Consequently, users of DBCP-containing products, such as Plaintiffs, were deprived of the opportunity of free choice as to whether or not to expose themselves to the DBCP-containing products manufactured by Defendants. Plaintiffs would show that as a result of the conduct of Defendants as aforesaid, they should be awarded an amount that would punish Defendants and act as a deterrent to Defendants and others from the commission of similar wrongs.

Compensatory Damages

16. As a direct and proximate result of Defendants tortious conduct as aforesaid, Plaintiffs, DOMINGO CASTRO ALFARO, ISMAIL CAMPOS ALPIZAR, OVIDIO MORERA ALVARADO, ALVARO MORERA ALVAREZ, JESUS HERNANDEZ BADILLA, EDWIN LEON BARBOZA, EFRAIM HERRA BARBOZA, WALDEMAR LOAIZA CALVO, EDURADO PEREZ CAMPOS, CLAUDIO SALAZAR CARBALLO, JORGE VAZQUEZ CARRILLO, EFRAIN NUNEZ CASTRO, JOEL DINARTE CASTRO, JORGE CASTRO CASTRO, SERGIO ZAMORA CASTRO, ALCIBIADES NUNEZ CESPEDES, MIGUEL ANGEL STELLER CHAVES, DIDIER ARIAS ELIZONDO, GREGORIA PEREZ ESPINOZA, SIGIFREDO MORALES ESPINOSA, FRANCISCO ARIAS FALLAS, MARITZA GOMEZ PEREZ, RIGOBERTO GARITA GARITA, MANUEL GOMEZ GOMEZ, ANGEL SOLANO GONZALEZ, FRANCISCO MORERA GONZALEZ, MARCIANO SOLANO GONZALEZ, ANDRES VEGA GRANADOS, ALFREDO BERMU-

DEZ HERNANDEZ, JUAN FIGUERO MATARRITA, URIEL NUNEZ MOYA, ELI ORDONEZ MURILLO, ISMAEL SALAS NUNEZ, ANTONIO VILLALOBOS ORTIZ, JORGE VEGA PEREZ, CARLOS LUIS MUNOZ RAMIREZ, FRANCISCO RAMIREZ RAMIREZ, VICENTE GUEVARA REYES, GERARDO ESPINOZA RODRIGUEZ, DANIEL ZUMBADO SALAS, MARIO ZUMBADO SALAS, RUBEN MORALES SALAZAR, ABELINO ROJAS SEQUEIRA, JOSE OBANDO SEQUEIRA, JOSE SIBAJA SOTA, ELEI ELIZONDO UMANA, JUAN ELIZONDO UMANA, ARNOLDO GALLO VALLEJOS and MANUEL FLORES VALVERDE, have developed sexual and reproductive abnormalities and other related conditions and have been damaged in the following particulars for all of which suit is herein brought:

(a) Said Plaintiffs have suffered great physical pain and mental anguish and will continue to suffer great pain of body and mind throughout their lifetime;

(b) Plaintiffs have incurred and will continue to incur hospital, medical, pharmaceutical and other expenses in the future due to their exposure to Defendants' aforesaid products;

(c) Plaintiffs suffer an extraordinarily increased likelihood of developing cancer as a result of their exposure to DBCP-containing products manufactured, sold and/or distributed by the named Defendants;

(d) Plaintiffs suffer an extraordinarily increased risk of genetic damage as a result of their exposure to Defendants' aforesaid products;

(e) Plaintiffs will suffer a loss of earning capacity due to their exposure to said DBCP-containing products;

(f) Plaintiffs will incur expenses for domestic help and nursing care in the future due to their exposure to Defendants' aforesaid products;

(g) Plaintiffs have lost the capacity to enjoy life and will continue to suffer such loss in the future due to their exposure to Defendants' aforesaid products;

(h) Plaintiffs, DEYANIRA CORDERO ALVARADO, FLORINDA ROJAS DURAN, JEREMY MORERA LOPEZ, ELIDIETH ROMAN AZOFEIFA, LUZ MARINA CAMPOS RODRIGUEZ, DELFINA ALMANZA PEREZ, NOEMY SALINAS SALINAAS, NURY BARBOZA MORA, CLARA MARIA CHAVEZ VARGAS, MARIA ESTER MONTERO BOGANTES, MARIA DEL SOCORRO SANCHEZ OSES, IRENE BARRERA CHAVARRIA, TERESA SANCHEZ ADOLIO, MARITZA GOMEZ PEREZ, MARIA CRISTINA CRUZ MARTINEZ, DEYANIRA ENRIQUEZ QUEVARA, LUZ RODRIGUES RAMIREZ, ELOISA RAMIREZ CAMPOS, FLORA ELENA FERNANDEZ ROBLES, MARTA JIMENEZ GONZALES, MARIA LUISA BERMUDEZ ORDONEZ, MIREYA PEREZ PEREIRA, MIRIAM CARTIN ARAYA, NATIVIDAD ROBLES DURATES, BASELISA MEDINA MATARRITA, MARITZA SOSSA SOSSA, XINIA VINDAS CASTILLO, MARIA CECILIA DURAN CORRALES, LEDA MARIA ROSALES ROSALES, ORLENDIA CASCANTE NAVARRO, BLANCA NIEVES ARIAS QUESADA, JUDITH CAMPOS GONZALEZ, BLANCA NIEVES CASCANTE NAVARRO

and ROSALIA SOLANO GONZALEZ, have suffered and will continue to suffer the loss of their husbands', DOMINGO CASTRO ALFARO, ISMAIL CAMPOS ALPIZAR, OVIDIO MORERA ALVARADO, ALVARO MORERA ALVAREZ, JESUS HERNANDEZ BADILLA, EDWIN LEON BARBOZA, EFRAIM HERRA BARBOZA, WALDEMAR LOAIZA CALVO, EDURADO PEREZ CAMPOS, CLAUDIO SALAZAR CARBALLO, JORGE VAZQUEZ CARRILLO, EFRAIN NUNEZ CASTRO, JOEL DINARTE CASTRO, JORGE CASTRO CASTRO, SERGIO ZAMORA CASTRO, ALCIBIADES NUNEZ CESPEDES, MIGUEL ANGEL STELLER CHAVES, DIDIER ARIAS ELIZONDO, GREGORIA PEREZ ESPINOZA, SIGIFREDO MORALES ESPINOSA, FRANCISCO ARIAS FALLAS, MARITZA GOMEZ PEREZ, RIGOBERTO GARITA GARITA, MANUEL GOMEZ GOMEZ, ANGEL SOLANO GONZALES, FRANCISCO MORERA GONZALEZ, MARCIANO SOLANO GONZALEZ, ANDRES VEGA GRANADOS, ALFREDO BERMUDEZ HERNANDEZ, JUAN FIGUEROA MATARRITA, URIEL NUNEZ MOYA, ELI ORDONEZ MURILLO, ISMAEL SALAS NUNEZ, ANTONIO VILLALOBOS ORTIZ, JORGE VEGA PEREZ, CARLOS LUIS MUNOZ RAMIREZ, FRANCISCO RAMIREZ RAMIREZ, VICENTE GUEVARA REYES, GERARDO ESPINOZA RODRIGUEZ, DANIEL ZUMBADO SALAS, MARIO ZUMBADO SALAS, RUBEN MORALES SALAZAR, ABELINO ROJAS SEQUEIRA, JOSE OBANDO SEQUEIRA, JOSE SIBAJA SOTA, ELEI ELIZONDO UMANA, JUAN ELIZONDO UMANA, ARNOLDO GALLO VALLEJOS and MANUEL FLORES VALVERDE, services, consortium, financial support and the

care and comfort of their society because of their said injuries and disabilities, and they will incur expenses medical and nursing attention rendered to her said husband in the future.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against the Defendants, and each of them, jointly and severally, for general and special damages and for punitive damages, for their costs expended herein, and for interest on said judgment from the date thereof until paid, at the legal rate, and for such other and further relief, both at law and in equity, to which the Plaintiffs may show themselves justly entitled.

Respectfully submitted,

BARON & ASSOCIATES
A Professional Corporation
1050 Dallas Federal Savings
Tower
Dallas, Texas 75225
(214) 369-3605

By: /s/ RUSSELL W. BUDD
Russell W. Budd
State Bar No. 03312400

CAUSE NO. 84-17171

Receipt No. 658279-$20.00-CBM

4-11-84 TR# 70241695

DOMINGO CASTRO ALFARO, et al.,
Plaintiff,

v.

SHELL OIL COMPANY, et at.

(Filed April 24, 1984)

CITATION

THE STATE OF TEXAS
County of Harris

To Any Sheriff or Constable of Texas

TO: Shell Oil Company, a Delaware corporation, by serving its registered agent, C. T. Corporation
811 Dallas Ave.
Houston, Tx. 77002

You are hereby commanded to appear in the Courtroom of the 113th Judicial District Court in the Courthouse in the City of Houston, Harris County, Texas, by filing a Written Answer in the Court and under the number and style shown in the caption above, to the accompanying Plaintiff's Petition attached hereto at or before 10 o'clock AM of the Monday next after the expiration of 20 days after the date you were served with this Citation.

A copy of the plaintiff's original Petition, filed on the 11th day of April 1984, the nature of which is set out in said Petition, is attached.

TO OFFICER SERVING:

This Citation is issued the 17th day of April, 1984, under my hand and the Seal of said Court. If this Citation is not served within 90 days from this date of issuance, it shall be returned to this Court unserved.

SEAL

RAY HARDY, Clerk of the
District Courts Of
Harris County, Texas

By: /s/ SARAH DAVIS
Sarah Davis, Deputy

Issued at request of: Baron & Associates
A Professional Corp.

Address: 1050 Dallas Federal Savings Tower
Dallas, Texas 75225

Bar No.: 03312400

APPENDIX E

CONRAD, F. WALTER, JR.

3000 ONE SHELL PLZ

HOUSTON, TX 77002

CRT — 061 CASE — 8417171

ALFARO, DOMINGO CASTRO

v.

SHELL OIL COMPANY

THIS IS TO ADVISE THAT IN THE ABOVE CAUSE A PARTIAL DISMISSAL ON AGREEMENT WAS SIGNED ON 04/13/87 AS TO

ALVARADO, DEYANIRA CORD
LOPEZ, JEREMY MORERA
BARBOZA, EFRAIM HERRA
RODIGUEZ, LUZ MARINA
CARRILLO, JORGE VAZQUEZ
DURAN, FLORINDA ROJAS
AZOFEIFA, ELIDIETH ROMA
CAMPOS, EDURADO PEREZ
PEREZ, DELFINA ALMANZA
SALINAAS, NOEMY SALINAS

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, TEXAS

CONRAD, F. WALTER, JR.

3000 ONE SHELL PLZ

HOUSTON, TX 77002

CRT — 061 CASE — 8417171

ALFARO, DOMINGO CASTRO

v.

SHELL OIL COMPANY

THIS IS TO ADVISE THAT IN THE ABOVE CAUSE A PARTIAL DISMISSAL ON AGREEMENT WAS SIGNED ON 04/13/87 AS TO

DURATES, NATIVIDAD ROBL
ORTIZ, ANTONIO VILLALOB
RAMIREZ, CARLOS LUIS MU
CORRALES, MARIA CECILIA
NAVARRO, ORLENDIA CASCA
MATARRITA, BASELISA MED
SOSSA, MARITZA SOSSA
CASTILLO, XINIA VINDAS
ROSALES, LEDA MARIA ROS
QUESADA, BLANCA NIEVES

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, TEXAS

CONRAD, F. WALTER, JR.
3000 ONE SHELL PLZ
HOUSTON, TX 77002

CRT — 061 CASE — 8417171

ALFARO, DOMINGO CASTRO

v.

SHELL OIL COMPANY

THIS IS TO ADVISE THAT IN THE ABOVE CAUSE A PARTIAL DISMISSAL ON AGREEMENT WAS SIGNED ON 04/13/87 AS TO

SEQUEIRA, JOSE OBANDO
NAVARRO, BLANCA NIEVES
VALLEJOS, ARNOLDO GALLO
GONZALEZ, FRANCISCO MOR
GONZALEZ, JUDITH CAMPOS
GONZALEZ, ROSALIA SOLAN
GOMEZ, MANUEL GOMEZ

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, TEXAS

CONRAD, F. WALTER, JR.
3000 ONE SHELL PLZ
HOUSTON, TX 77002

CRT — 061 CASE — 8417171

ALFARO, DOMINGO CASTRO

v.

SHELL OIL COMPANY

THIS IS TO ADVISE THAT IN THE ABOVE CAUSE A PARTIAL DISMISSAL ON AGREEMENT WAS SIGNED ON 04/13/87 AS TO

MARTINEZ, MARIA CRISTIN
RAMIREZ, LUZ RODRIGUES
ROBLES, FLORA ELENA FER
HERNANDEZ, ALFREDO BERM
PEREIRA, MIREYA PEREZ
QUEVARA, DEYANIRA ENRIQ
CAMPOS, ELOISA RAMIREZ
GONZALES, MARTA JIMENEZ
ORDONEZ, MARIA LUISA BE
ARAYA, MIRIAM CARTIN

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, TEXAS

CONRAD, F. WALTER, JR.
3000 ONE SHELL PLZ
HOUSTON, TX 77002

CRT — 061 CASE — 8417171

ALFARO, DOMINGO CASTRO

v.

SHELL OIL COMPANY

THIS IS TO ADVISE THAT IN THE ABOVE CAUSE A PARTIAL DISMISSAL ON AGREEMENT WAS SIGNED ON 04/13/87 AS TO

CASTRO, EFRAIN NUNEZ
MORA, NURY BARBOZA
BOGANTES, MARIA ESTER M
CHAVARRIA, IRENE BARRER
ESPINOSA, SIGIFREDO MOR
CASTRO, JORGE CASTRO
VARGAS, CLARA MARIA CHA
OSES, MARIA DEL SOCORRO
ADOLIO, TERESA SANCHEZ
PEREZ, MARITZA GOMEZ

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, TEXAS

NO. 84-17,171

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
61ST DISTRICT COURT

DOMINGO CASTRO ALFARO, ET AL

v.

DOW CHEMICAL COMPANY, ET AL

ORDER

On this the _____ day of April, 1987 came on to be heard the motion of Dow Chemical Company and Shell Oil Company for sanctions in seeking dismissal of certain plaintiffs herein for failure to answer discovery; and, it appearing to the Court that such motion should be granted, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that the claims and causes of action asserted herein by the following plaintiffs are dismissed for failure to answer discovery including failure to file answers to requests for admission or written interrogatories:

Deyanira Cordero Alvarado;
Florinda Rojas Duran;
Jeremy Morera Lopez;
Elidieth Roman Azofeifa;
Efraim Herra Barboza;
Eduardo Perez Campos;
Luz Marina Campos Rodriguez;
Delfina Almanza Perez;
Jorge Vazquez Carrillo;
Noemy Salinas Salinaas;
Efrain Nunez Castro;

Jorge Castro Castro;
Nury Barboza Mora;
Clara Maria Chavez Vargas;
Maria Ester Montero Bogantes;
Maria Del Socorro Sanchez Oses;
Irene Barrera Chavarria;
Teresa Sanchez Adolio;
Sigifredo Morales Espinosa;
Maritza Gomez Perez;
Maria Christina Cruz Martinez;
Deyanira Enriquez Quesara;
Luz Rodrigues Ramirez;
Eloisa Ramirez Camos;
Flora Elena Fernandez Robles;
Marta Jimenez Gonzales;
Alfredo Bermudez Hernandez;
Maria Luisa Bermudez Ordonez;
Mireya Perez Pereira;
Miriam Cartin Araya;
Natividad Robles Durates;
Baselisa Medina Matarrita;
Antonio Villalobos Ortiz;
Maritza Sossa Sossa;
Carlos Luis Munoz Ramirez;
Xinia Vindas Castillo;
Maria Cecilia Duran Corrales;
Leda Maria Rosales Rosales;
Orlendia Cascante Navarro;
Blanca Nieves Arias Quesada;
Jose Obando Sequeira;
Judith Campos Gonzalez;
Blanca Nieves Cascante Navarro;
Rosalia Solano Gonzalez;
Arnoldo Gallo Vallejuos;
Manuel Gomez Gomez;
Francisco Morera Gonzalez.

Costs of court relating to the claims and causes of action of those plaintiffs dismissed above shall be taxed to the parties incurring them.

In all other respects, the Motions for Sanctions and the Motions to Dismiss for Failure to Provide Discovery* in the above referenced cases are hereby dismissed.

SIGNED this _____ day of April, 1987.

_____

DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

BAKER & BOTTS

By: /s/ F. WALTER CONRAD
F. Walter Conrad
Bar No. 04709000
Attorney for Defendant
Dow Chemical Company

SHELL OIL COMPANY

By: /s/ BURT BALLANFANT
Burt Ballanfant
Bar No. 1647000
Attorney for Defendant
Shell Oil Company

BARON & BUDD

By: /s/ CHARLES S. SIEGEL
Charles S. Siegel
Bar No. 18341875
Attorney for Plaintiffs

---

* which are set for hearing on April 13, 1987.

APPENDIX F

NO. 84-17,171

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
61st JUDICIAL DISTRICT

DOMINGO CASTRO ALFARO, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

ORDER OF DISMISSAL

On April 28, 1987, came on before the Court the motions to dismiss for lack of jurisdiction and to dismiss on the basis of forum non conveniens of Dow Chemical Company and Shell Oil Company; and the Court having heard argument of counsel, read the briefs and affidavits filed by all the parties herein; reviewed the responses to discovery on file with the Court; and reviewed the stipulations filed by defendants has determined that the Court has jurisdiction of all the remaining claims asserted herein but that the defendants' motion to dismiss on the basis of forum non conveniens is meritorious and should be granted as to all parties for the reasons stated in the briefs and motions filed herein by the defendants; therefor it is hereby

ORDERED that the claims of Domingo Castro Alfaro; Ismail Campos Alpizar; Ovidio Morera Alvarado; Alvaro Morera Alvarez; Jesus Hernandez Badilla; Edwin Leon

Barboza; Waldemar Loaiza Calvo; Claudio Salazar Carbello; Joel Dinarte Castro; Sergio Zamora Castro; Alcibiades Nunez Cespedes; Miguel Angel Steller Chaves; Didier Arias Elizondo; Gregoria (Gregorio) Perez Espinoza; Francisco Arias Fallas; Rigoberto Garita Garita; Angel Solano Gonzales; Marciano Solano Gonzales; Andres Vega Granados; Juan Figueroa Matarrita; Uriel Nunez Moya; Eli Ordonez Murillo; Ismael Salas Nunez; Jorge Vega Perez; Francisco Ramirez Ramirez; Vicente Guevara Reyes; Gerardo Espinoza Rodriguez; Daniel Zumbado Salas; Mario Zumbado Salas; Ruben Morales Salazar; Abelino Rojas Sequeira; Jose Sibaja Sota; Elei Elizondo Umana; Juan Elizondo Umana; and Manuel Flores Valverde; are dismissed as to all parties under the doctrine of forum non conveniens subject to: (1) the stipulations filed herein by Dow Chemical Company and Shell Oil Company and (2) to this case being refiled if the defendants do not comply with the terms of those stipulations. The above-named plaintiffs, citizens of Costa Rica, shall hereafter have the right to proceed with this litigation, if they choose to do so, in Costa Rica where the causes of action arose. All pending motions not expressly granted herein are denied. Limitations statute tolled during pendency of this case in this Court.

SIGNED AND ENTERED at Houston, Texas this 22nd day of June, 1987.

By: /s/ SHEARN SMITH
Shearn Smith
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

SHELL OIL COMPANY

By: BURT BALLANFANT
Burt Ballanfant
Bar No. 1647000
Room 4794
One Shell Plaza
P. O. Box 2463
Houston, TX 77252

By: JOSE A. BERLANGA
Jose A. Berlanga
Bar No. 02203400
Room 4708
One Shell Plaza
P. O. Box 2463
Houston TX 77252

DOW CHEMICAL

By: F. WALTER CONRAD
F. Walter Conrad
Bar No. 04709000
3000 One Shell Plaza
Houston, TX 77252

APPROVED AS TO FORM ONLY:

PLAINTIFFS

By: CHARLES S. SIEGEL
Bar No. 18341875
8333 Douglas
Dallas, TX 75225

APPENDIX G

RUSSELL W. BUDD
JANE N. SAGINAW
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
214/369-3605

FEDERICO C. SAYRE
SAYRE, MORENO, PURCELL, AND BOUCHER
10351 Santa Monica Boulevard
Suite 406
Los Angeles, California 90025
213/556-8186

Attorneys for Plaintiffs

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. 0570052

COMPLAINT FOR DAMAGES:

1. Negligence;
2. Strict Liability;
3. Breach of Implied Warranty of Merchantability;

PLAINTIFF'S ORIGINAL COMPLAINT
AND JURY DEMAND

RODRIGO ESQUIVEL AGUILAR and
ADALI CORDERO ALVARADO;
JOSE ANTONIO ROJAS ARAYA and
AURORA AGUERO AGUERO;
OLGER CARTIN ARAYA;
OUIDIO AGUERO ARGUELLO and
MARIA ESTER BERMUDEZ ALAVARADO;
PORFIRO TREJOS BARRANTES and
ELISABETH SALAS RODRIGUEZ;
JUAN MANUEL JIMENEZ CAMBRONERO and
ELVIVA BELLO LOPEZ;
VASILIO SANCHEZ CARAZO and
VINCENTA GARCIA BARRIENTOS;
CLAUDIO SALAZAR CARBALLO and
DELFINA ALMANZA PEREZ;
RAMON VICTORIANO PEREZ FERNANDEZ and
ALEXA SUAREZ MORALES;
DAGOBERTO ARAYA GARITA;
JOSE ANTONIO ZUNIGA GUTIERREZ and
IRIABEL ESPINOZA RODRIGUEZ;
FRANCISCO MELENDEZ MELENDEZ and
ROSA LIZANO SATRUCH;
ADRIAN GOMEZ MONTERO;
MARIO TULIO VILLALOBOS MURRILLO and
LUZ MARIA AGUERO AGUERO;
OLMAN MIRANDA NUNEZ and
CLARIBEL MIRANDA CAJNA;
GERARDO ESPINOZA RODRIGUEZ and
MARIA SALAZAR BALTODANO;
EDWIN CORRALES ROJAS and

VIRGITA HERNANDEZ ARGUEDAS;
MANUEL SANCHEZ SEGURA and
ALEIDE GONZALEZ MORERA;
VICTOR JULIO RODRIGUEZ VASQUEZ

v.

DOW CHEMICAL COMPANY,
SHELL OIL COMPANY and
AMVAC CHEMICAL CORPORATION,

Defndants.

COME NOW the above-referenced Plaintiffs complaining of the Defendants SHELL OIL COMPANY, DOW CHEMICAL COMPANY and AMVAC CHEMICAL CORPORATION and for cause of action would show the Court and jury as follows:

1. Plaintiffs are residents of Costa Rica. Defendant AMVAC CHEMICAL COMPANY has its principal offices in Los Angeles, Los Angeles County, California and, therefore, venue lies aganst all Defendants in Los Angeles County.

2. Defendant, AMVAC CHEMICAL COMPANY is a California corporation with its principal place of business in Los Angeles County; said defendant may be served at its corporate headquarters, 4100 East Washington Boulevard, Los Angeles, California 90023.

3. Defendant, DOW CHEMICAL COMPANY, is a Delaware corporation with its principal place of business in a state other than California; said corporation may be served through its registered agent, John E. Dicks, Lover Ridge Road, Pittsburg, California 94565.

4. Defendant, SHELL OIL COMPANY, is a Delaware corporation with its principal place of business in a state other than California; said corporation may be served through its registered agent, C. T. Corporation Systems, 800 South Figueroa Street, Los Angeles, California 90017.

5. This cause of action is predicated on products liability theories of strict liability, implied warranty and negligence, as more specifically alleged herein. The products complained of are nematocides containing the chemical dibromochloropropane, commonly known as DBCP. These products were manufactured, sold and distributed by the Defendants DOW CHEMICAL COMPANY, SHELL OIL COMPANY and AMVAC CHEMICAL CORPORATION.

6. Plaintiffs, RODRIGO ESQUIVEL AGUILAR, JOSE ANTONIO ROJAS ARAYA, OLGER CARTIN ARAYA, OUIDIO AGUERO ARGUELLO, PORFIRO TREJOS BARRANTES, JUAN MANUEL JIMENEZ CAMBRONERO, VASILIO SANCHEZ CARAZO, CLAUDIO SALAZAR CARBALLO, RAMON VICTORIANO PEREZ FERNANDEZ, DAGOBERTO ARAYA GARITA, JOSE ANTONIO ZUNIGA GUTIERREZ, FRANCISCO MELENDEZ MELENDEZ, ADRIAN GOMEZ MONTERO, MARIO TULIO VILLALOBOS MURRILLO, OLMAN MIRANDA NUNEZ, GERARDO ESPINOZA RODRIGUEZ, EDWIN CORRALES ROJAS, MANUEL SANCHEZ SEGURA, and VICTOR JULIO RODRIGUEZ VASQUEZ, allege that they were exposed to these products in Costa Rica and, as a result thereof, have suffered serious and permanent personal injuries including, but not limited to, sterility.

NEGLIGENCE

7. The illnesses and disabilities of the Plaintiffs, RODRIGO ESQUIVEL AGUILAR, JOSE ANTONIO ROJAS ARAYA, OLGER CARTIN ARAYA, OUIDIO AGUERO ARGUELLO, PORFIRO TREJOS BARRANTES, JUAN MANUEL JIMENEZ CAMBRONERO, VASILIO SANCHEZ CARAZO, CLAUDIO SALAZAR CARBALLO, RAMON VICTORIANO PEREZ FERNANDEZ, DAGOBERTO ARAYA GARITA, JOSE ANTONIO ZUNIGA GUTIERREZ, FRANCISCO MELENDEZ MELENDEZ, ADRIAN GOMEZ MONTERO, MARIO TULIO VILLALOBOS MURRILLO, OLMAN MIRANDA NUNEZ, GERARDO ESPINOZA RODRIGUEZ, EDWIN CORRALES ROJAS, MANUEL SANCHEZ SEGURA, and VICTOR JULIO RODRIGUEZ VASQUEZ, are a direct and proximate result of the negligence of each Defendant in that said Defendants produced, sold and/or otherwise put into the stream of commerce, DBCP-containing materials which the Defendants knew, or in the exercise of ordinary care ought to have known, were deleterious and highly harmful to said Plaintiffs' health and well being. The Defendants were negligent in one, some and/or all of the following respects, among others, same being the proximate cause of said Plaintiffs' illnesses and disabilities.

(a) In failing to adequately warn Plaintiffs of the dangerous characteristics of DBCP;

(b) In failing to provide Plaintiffs with information as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there were any, to protect Plaintiff from being harmed and disabled by exposure to DBCP;

(c) In failing to place adequate warnings in Spanish on the containers of said DBCP-containing materials to warn of the dangers to health of coming into contact with said DBCP;

(d) In failing to take reasonable precaution or exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and applying DBCP;

(e) In failing to develop and utilize a substitute material for DBCP in the aforesaid nematocides;

(f) In failing to test DBCP prior to releasing these products for sale; and

(g) In concealing the results of any tests conducted on DBCP by Defendants, if in fact any Defendant ever tested its DBCP-containing products.

STRICT LIABILITY

8. All of the allegations contained in the previous paragraphs are realleged herein.

9. The DBCP-containing products that were used and applied by Plaintiff were designed and manufactured by Defendants and subsequently sold, directly and indirectly, to the various employers of Plaintiffs. Said products left the hands of Defendants in a defective and unreasonably dangerous condition in the following respects:

(a) said DBCP-containing products did not contain an adequate and timely warning regarding the serious health health hazards associated with DBCP;

(b) said products did not contain an adequate and timely warning to the effect that protective equipment should be used when working with DBCP;

(c) said products were defectively designed in that they contained DBCP although a substitute for this chemical was available at all times material to this litigation.

(d) said products were defectively designed in that they did not contain an adequate and timely warning concerning the hazards of DBCP and the need for safety precautions when using DBCP;

(e) said products were unreasonably dangerous *per se.*

10. Each Defendant is and/or was engaged in the business of manufacturing and/or distributing such DBCP-containing products and these products, without substantial change in condition after they were sold, were a producing cause of the damages sustained by Plaintiffs.

11. Plaintiffs were unaware of the dangerous propensities of the products which rendered them unsafe for their intended use. Plaintiffs used the aforementioned products in a manner that was reasonably anticipated by the Defendants. Further, during the periods that said Plaintiffs were exposed to the products of the Defendants, said products were being utilized in a manner which was intended by Defendants.

IMPLIED WARRANTY

12. All of the allegations contained in the previous paragraphs are realleged herein.

13. The Defendants impliedly warranted that their DBCP-containing products were of good and merchantable quality and fit for their intended use.

14. The Plaintiffs would show that they worked in close proximity to the DBCP-containing products of the Defendants and their presence was known or ought to have been reasonably anticipated by the Defendants. The implied warranty made by the Defendants that their aforesaid products were of a good and merchantable quality and were fit for their particular intended use was breached in that Plaintiffs' work with Defendants' products caused them to be exposed to DBCP and to be injured as a proximate result thereof.

EXEMPLARY DAMAGES

15. The Plaintiffs would show that the damages incurred as described herein were directly and proximately caused by the reckless and grossly negligent commissions and omissions, conscious indifference, and utter disregard for the welfare of the said Plaintiffs on the part of the Defendants herein, their agents, servants, employees, managers, superintendants, supervisors, and officers in that they ignored and concealed evidence available to them which indicated that DBCP and DBCP-containing materials were harmful and deadly to persons coming in contact with said materials. Consequently, users of DBCP-containing products, such as Plaintiffs, were deprived of the opportunity of free choice as to whether or not to expose themselves to the DBCP-containing products manufactured by Defendants. Plaintiffs would show that as a result of the conduct of Defendants as aforesaid, they should be awarded an amount that wound punish Defendants and act as a deterrent to Defendants and others from the commission of similar wrongs.

COMPENSATORY DAMAGES

16. As a direct and proximate result of Defendants tortious conduct as aforesaid, Plaintiffs, RODRIGO ESQUIVEL AGUILAR, JOSE ANTONIO ROJAS ARAYA, OLGER CARTIN ARAYA, OUIDIO GUERO ARGUELLO, PORFIRO TREJOS BARRANTES, JUAN MANUEL JIMENEZ CAMBRONERO, VASILIO SANCHEZ CARAZO, CLAUDIO SALAZAR CARBALLO, RAMON VICTORIANO PEREZ FERNANDEZ, DAGOBERTO ARAYA GARITA, JOSE ANTONIO ZUNIGA GUTIERREZ, FRANCISCO MELENDEZ MELENDEZ, ADRIAN GOMEZ MONTERO, MARIO TULIO VILLALOBOS MURRILLO, OLMAN MIRANDA NUNEZ, GERARDO ESPINOZA RODRIGUEZ, EDWIN CORRALES ROJAS, MANUEL SANCHEZ SEGURA, and VICTOR JULIO RODRIGUEZ VASQUEZ, have developed sexual and reproductive abnormalities and other related conditions and have been damaged in the following particulars for all of which suit is herein brought:

(a) Said Plaintiffs have suffered great physical pain and mental anguish and will continue to suffer great pain of body and mind throughout their lifetime;

(b) Plaintiffs have incurred and will continue to incur hospital, medical, pharmaceutical and other expenses in the future due to their exposure to Defendants' aforesaid products;

(c) Plaintiffs suffer an extraordinarily increased likelihood of developing cancer as a result of their exposure to DBCP-containing products manufactured, sold and/or distributed by the named Defendants;

(d) Plaintiffs suffer an extraordinarily increased risk of genetic damage as a result of their exposure to Defendants' aforesaid products;

(e) Plaintiffs will suffer a loss of earning capacity due to their exposure to said DBCP-containing products;

(f) Plaintiffs will incur expenses for domestic help and nursing care in the future due to their exposure to Defendants' aforesaid products;

(g) Plaintiffs have lost the capacity to enjoy life and will continue to suffer such loss in the future due to their exposure to Defendants' aforesaid products;

(h) Plaintiffs, ADALI CORDERO ALVARADO, AURORA AGUERO AGUERO, MARIA ESTER BERMUDEZ ALVARADO, ELISABETH SALAS RODRIGUEZ, ELVIVA BELLA LOPEZ, VINCENTA GARCIA BARRIENTOS, DELFINA ALMANZA PEREZ, ALEXA SUAREZ MORALES, IRIABEL ESPINOZA RODRIGUEZ, ROSA LIZANO SATRUCH, LUZ MARIA AGUERO AGUERO, CLARIBEL MIRANDA CAJNA, MARIA SALAZAR BALTODANO, VIRGITA HERNANDEZ ARGUEDAS, and ALEIDE GONZALEZ MORERA, have suffered and will continue to suffer the loss of their husbands', RODRIGO ESQUIVEL AGUILAR, JOSE ANTONIO ROJAS ARAYA, OLGER CARTIN ARAYA, OUIDIO AGUERO ARGUELLO, PORFIRO TREJOS BARRANTES, JUAN MANUEL JIMENEZ CAMBRONERO, VASILIO SANCHEZ CARAZO, CLAUDIO SALAZAR CARBALLO, RAMON VICTORIANO PEREZ FERNANDEZ, DAGOBERTO ARALA GARITA, JOSE ANTONIO ZUNIGA GUTIERREZ, FRANCISCO MELENDEZ MELENDEZ, ADRIAN GOMEZ MONTERO, MARIO TULIO VILLALOBOS MURRILLO, OLMAN MIRANDA NUNEZ, GERARDO ESPINOZA RODRIGUEZ, EDWIN CORRALES ROJAS, MANUEL SANCHEZ SEGURA, and VICTOR JULIO RODRIGUEZ VASQUEZ, services, consortium, financial support and the care and comfort

of their society respectively because of their said injuries and disabilities, and they will incur expenses medical and nursing attention rendered to her said husband in the future.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against the Defendants, and each of them, jointly and severally, for general and special damages and for punitive damages, for their costs expended herein, and for interest on said judgment from the date thereof until paid, at the legal rate, and for such other and further relief, both at law and in equity, to which the Plaintiffs may show themselves justly entitled.

Respectfully submitted,

BARON & BUDD

By: /s/ RUSSELL W. BUDD
Russel W. Budd

By: /s/ JANE N. SAGINAW
Jane N. Saginaw

Attorneys for Plaintiffs

AND

SAYRE, MORENO, PURSELL,
AND BOUCHER
10351 Santa Monica Boulevard
Suite 406
Los Angeles, California 90025
213/556-8186

By: /s/ FEDERICO CASTELAN SAYRE
Federico Castelan Sayre

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 86-4753 JGD (TX)

RODRIGO ESQUIVEL AGUILAR, et al.,
Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

ORDER VACATING ORDER TO SHOW CAUSE RE: REMAND; ORDER DISMISSING ACTION; ORDER REGARDING CONDITIONAL DISMISSAL

On December 1, 1986, this Court found that it had diversity jurisdiction of this action and then granted the defendants' motion to dismiss this action on forum non conveniens grounds. Following the hearing, the parties submitted post-hearing briefs on the conditions of dismissal. Numerous issues and complicated facts have arisen during the brief time that this matter has been before this Court. By this Order, the Court now clarifies its reasoning in reaching the decisions of December 1, 1986 and also sets forth the conditions of dismissal.

I. *UNDERLYING FACTS*

On October 15, 1986, the plaintiffs, thirty-four citizens and residents of Costa Rica, filed a complaint in state court alleging causes of action for negligence, strict liability, and breach of the implied warranty of merchantability. The plaintiffs alleged that while working on a

banana plantation in Costa Rica, they were exposed to a chemical, dibromochloropropane ("DBCP"), which had caused them to suffer personal injuries. Some of the plaintiffs' wives also brought claims for loss of consortium. The plaintiffs alleged that the defendants had manufactured, produced, sold, or had otherwise placed DBCP into the stream of commerce so that they were exposed to it.

Named as defendants were Dow Chemical Company ("Dow"), Shell Oil Company ("Shell"), and Amvac Chemical Corporation ("Amvac"). Neither Dow nor Shell are incorporated in California; neither has its principal place of business here. Amvac's principal place of business is in California, and it is incorporated in California. Although all of the defendants were of diverse citizenship from the foreign plaintiffs, the action could not be removed to federal court because of Amvac's presence. *See* 28 U.S.C. section 1441(b) (diversity action is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought").

On July 22, 1986, Dow filed a petition for removal; the other defendants joined in it. The reason alleged for removal was that testimony given at a deposition conducted on June 24, 1986 had disclosed that none of the DBCP produced by Amvac had been used in the Costa Rican operations of the plaintiffs' employer. Dow therefore claimed that Amvac was merely a sham defendant and that the action was now removable to federal court.

On July 29, 1986, Dow filed a motion in this Court to the dismiss the action on forum non convenience grounds. Amvac filed a motion on the same ground on

July 31, 1986. Shell joined in Dow's motion on August 4, 1986. Similar motions had been pending in state court at the time the action was removed.

Because of uncertainty about the status of Amvac as a defendant, on August 5, 1986, this Court served an order to show cause why the matter should not be remanded to state court. The order required that the defendants submit their papers by August 22, 1986 and that the plaintiffs file their response by August 29, 1986.

In accordance with the Court's order to show cause, the defendants submitted their memoranda of points and authorities on the remand issue by August 22, 1986, briefing in particular their contentions that Amvac was a "sham" defendant. On August 22, 1986, plaintiffs filed a motion to conduct further discovery on forum non conveniens. Their papers revealed for the first time that in fact the plaintiffs had filed an amended complaint in state court *one* day prior to Dow's filing of the petition for removal on July 22, 1986. As of August 22, 1986, none of the defendants had been served with the amended complaint, nor did any of them know of its existence. The amended complaint named as new defendants Dow Chemical International and Does 1 through 100.

Meanwhile, on September 10, 1986, this Court signed an order dismissing without prejudice Amvac from the action. The plaintiffs stated in their notice of dismissal that they had been unable to discover any evidence that the plaintiffs had been exposed to any DBCP-containing products manufactured or distributed by Amvac.

At a hearing conducted on September 15, 1986, this Court granted the plaintiffs' motion to conduct additional discovery with respect to the defendants' pending motions to dismiss on forum non conveniens. The Court allowed an additional month's discovery, noting that the plaintiffs had been on notice that this was an issue in the action and had presumably been conducting discovery on it since at least May 1986 when Dow filed a motion to dismiss on forum non conveniens grounds in state court.

Because the remand issue had never been resolved, that same date the Court served a minute order on all parties. In effect, the Court requested that the parties file supplemental briefs directed to the first amended complaint and the new issue of the Doe defendants. The Court suggested that the plaintiffs might use their additional discovery time to attempt to identify the Doe defendants. *See Bryant v. Ford Motor Co.*, 794 F.2d 450, 453 F.2d (9th Cir. 1986) (suggesting that the district court may wish to consider the state court plaintiff's response to a claim that Doe defendants are fictitious in determining whether remand is required).

On November 10, 1986, the Court continued resolution of the remand issue and the defendants' motion to dismiss on forum non conveniens until December 1, 1986. The Court expressed its concern that the petition for removal did not strictly comply with the requirements of 28 U.S.C. section 1446(a) in that the petition had been based upon and had attached to it the original complaint filed in state court, rather than the amended complaint. Although all of the parties upon learning of its existence had treated the amended complaint as the operative pleading, the Court requested that the

defendants file an amended petition for removal that would reflect the allegations of the amended complaint. *See London v. Standard Oil of California*, 417 F.2d 820, 822 (9th Cir. 1969) (allowing amendment of a removal petition to "cure any deficiency in establishing diversity jurisdiction").

On December 1, 1986, this Court, after first finding that it had jurisdiction over this matter, granted the defendants' motion to dismiss on forum non conveniens.

II. *Legal Issues*

A. Propriety of Removal

The plaintiffs in this action are all citizens of Costa Rico; the named corporate defendants are citizens of various states. Plaintiffs are claiming damages in excess of $10,000. District courts have original jurisdiction of matters where the sum in controversy exceeds $10,000 and the action is between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. section 1332(a)(2).

At the time of removal, Amvac was still a defendant in this action, but the defendants had contended that recent deposition testimony revealed that Amvac was merely a "sham" defendant. Since Amvac was subsequently dismissed by the plaintiffs, the issues involving Amvac are now moot. Dow Chemical International was named as a defendant in the amended complaint, although it was apparently never served. But since Dow Chemical International is incorporated in Delaware and has its principal place of business in Michigan, its presence would not have destroyed diversity.

Therefore, the primary issue before this Court was the effect of the Doe defendant allegations contained in the amended complaint. In *Sorosky v. Burroughs Corp.*, 798 F.2d 1274 (9th Cir. 1986), the Ninth Circuit stated that as a general rule the presence of Doe defendants defeats diversity since it prevents a court from affirmatively ascertaining that complete diversity exists. But the Ninth Circuit explained that an exception might apply " 'when the Does are wholly fictitious or when the charges against the Does are so general that no clue is given as to their identity or their relationship to the cause of action.' " *Id.* at 1276. In *Sorosky*, the court found that allegations that the Does were "agents and employees" of the defendant, "while lean,' sufficed to give the defendants " 'some clue as to the possible identity' of the Doe defendants." *Id. See also Bryant v. Ford Motor Co.*, 794 F.2d 450, 451-53 (9th Cir. 1986) (purpose of allowing exception to rule was "the need to prohibit plaintiffs who initiate actions in state court from defeating removal jurisdiction by the use of pleading fictions").

At first glance, it appears that that the Doe allegations in the case at hand would fall within the parameters of the general rule set forth in *Sorosky, supra*, that the presence of Doe defendants ordinarily defeats diversity jurisdiction. The plaintiffs had alleged that each of the Doe defendants "was an agent, servant or employee of the remaining Defendants" and that the Doe defendants were responsible for the "importation, operation, design, distribution, ownership, possession, supervision, servicing, maintenance, inspection, repair, control, entrustment, use, furnishing, manufacturing or sale of the

premises which caused the injuries and damages herein alleged." Amended Complaint at ¶ ¶ 7, 8.

The complaint also alleged that the products in question were "manufactured, sold and distributed by Defendants Dow Chemical Company, Shell Oil Company, Amvac Chemical Corporation, Dow Chemical International, Inc. and DOES 1 through 100, inclusive, and each of them." Id. at ¶ 9.

However, given the peculiar circumstances of this action, the Court was convinced that the Doe defendants were "wholly fictitious." The Doe allegations were so broad that it was impossible to ascertain whether they did, in fact, provide the named defendants with a "clue" to the Doe defendants' identity. There also were no allegations in the amended complaint that even suggested that any of the employees or agents of the named defendants were foreign citizens. For in this particular situation, where all of the named plaintiffs were foreign citizens, only if the Doe defendants were foreign citizens would they defeat diversity.

In their supplemental brief on this issue, the plaintiffs did not claim or suggest that any of the Doe defendants were foreign residents. However, they identified Charles Hine Laboratories, Inc., a California corporation with its principal place of business in California, and Charles H. Hine, M.D., a California resident [the "Hine entities"], as the Doe defendants. The plaintiffs alleged that they would move the Court to further amend their complaint in order to add the Hine entities as defendants.

The plaintiffs did not contend that the Hine entities were agents or employees of the named defendants, but

they did claim that the Hine entities were "responsible for the testing" of DBCP-containing pesticides manufactured by Shell and that they had "participated in studies" with Dow researchers. The exhibits attached to the supplemental brief indicated that Charles H. Hine, M.D., while connected with the University of California, had conducted certain research related to DBCP during the 1950's and early 1960's.

The plaintiffs' "identification" of the Doe defendants posed some interesting questions. For one, the Hine entities do not appear to fall within the Doe allegations made in the amended complaint. The amended complaint stated that "each of the Defendants was an agent, servant or employee of the remaining Defendants." As noted above, the plaintiffs did not claim that the Hine entities were agents, servants, or employees of the named defendants, and the exhibits attached to their brief did not seem to indicate that this was the case. Furthermore, despite the extremely long and broad list of acts which the Doe defendants had allegedly performed, none of the Doe allegations related to the research and testing of the DBCP. There was also no suggestion that the Hine entities had "manufactured, sold and distributed" DBCP, although it had been alleged in the amended complaint that the Doe defendants, and "each of them," had done so. Thus, the Court concluded that the Hine entities were not identifiable by the Doe allegations.

Moreover, the presence of the Hine entities in the action would not destroy diversity since they were not foreign citizens. The plaintiffs argued, however, that the presence of Doe defendants that might be California

residents dictated that the case be remanded to state court because an action cannot be removed initially when a defendant's citizenship is the same as the forum court.

28 U.S.C. section 1441(b) indicates that an action based upon diversity of citizenship "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." On its face, this section suggests that a defendant who is a citizen of the forum state—but who would not otherwise destroy diversity—must be *properly joined and served* in order to prevent removal.

In the case at hand, neither Charles E. Hine, M.D. nor Charles Hine Laboratories, Inc. had been joined or served at the time this action was removed to federal court. It thus appears that any later amendment adding them to the action on the basis of Doe defendant allegations or otherwise would not mandate remand to the state court. Their presence could not destroy diversity of citizenship, although it would have prevented removal initially had they been properly joined and served at that time.

The defendants drew this Court's attention to a possible contrary interpretation of section 1441(b) in *Pecherski v. General Motors Corp.*, 636 F.2d 1156 (8th Cir. 1981). This Court is not persuaded that *Pecherski* is convincing authority for the proposition that *once an action has been removed*, the federal court must remand it to state court if newly-named defendants or defendants substituted for Doe defendants are citizens of the forum state—even if their citizenship would not destroy diversity. The Court reaches this conclusion in part from the clear language of section 1441.

Moreover, *Pecherski* differs factually from the case at hand. There the plaintiff was a citizen of the forum state. If the Doe defendant in question, "Jane Doe," were also a resident, the action could not have been removed because there would have been no diversity. Any argument that the action should not have been removed *solely* on the ground that she was a resident of the forum state was necessarily subsumed by the threshold question of diversity jurisdiction. But in the case now before the Court, the plaintiffs are not citizens of California. The presence of California defendants cannot destroy diversity. Therefore, the citizenship of the Hine entities would be significant only if they had been *joined and served* at the time the action was removed.

Both the Fifth and Tenth Circuits have held that once an action has been removed, a plaintiff may waive his right to object that some of the removing defendants were residents of the forum court. *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985); *American Oil Company v. McMullin*, 433 F.2d 1091 (10th Cir. 1970).

In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344, 31 L.Ed.2d 612 (1972), the United States Supreme Court, in refusing to vacate a judgment on the ground that the district court had allegedly lacked jurisdiction, held that after an action had been tried on the merits "the issue in subsequent proceedings is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702-03.

In reaching this conclusion, the Court distinguished its decision from *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L.Ed. 702 (1951). In *Finn*, the plaintiffs and one of the defendants had been citizens of the same state. Even though judgment had been rendered, the Court held that the action had been improperly removed, and it remanded the case to the district court with instructions to vacate the judgment. The distinguishing feature of *Finn* was that there was not complete diversity of citizenship. The district court did not have jurisdiction to try the case.

Waiver, of course, is not an issue in this case. But the authorities cited above suggest that removal procedures are not jurisdictional since they may be waived. There thus appears to be no reason why the "joined and served" language of section 1441 should not be strictly construed in those cases where diversity would not be destroyed. As noted previously, a district court has original jurisdiction of matters between "citizens of a State and citizens or Subjects of a foreign state." 28 U.S.C. section 1332(a)(2). This Court has original jurisdiction over the parties. The presence of potential California defendants cannot destroy this jurisdiction; nor would their presence require remand since they were not joined and served when the action was removd.

B. Forum Non Conveniens

The Ninth Circuit has apparently not decided whether federal law or state law should be applied in making a forum non conveniens determination. In *Miskow v. Boeing*, 664 F.2d 205 (9th Cir. 1981), the plaintiffs had filed an action in state court which the state court had dismissed for forum non conveniens. They then filed the

same action in federal court, and the district court dismissed it for the same reason. On appeal, the Ninth Circuit declined to decide whether state law would govern forum non conveniens, but noted that if there was any doubt, the plaintiffs would have "a difficult burden to convince this court that it should not follow the state court's determination." *Id.* at 207 f.2.

Because of the facts in the case, the Ninth Circuit's conclusion seems ambiguous. But the Ninth Circuit clearly followed the standards enunciated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L.Ed. 1055 (1947), in affirming dismissal of the action on forum non conveniens.

More recently, in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 106 S. Ct. 347 (1985), the Eleventh Circuit held that federal law, rather than state law, applied to a forum non conveniens determination. In that action, which was brought by co-workers of these plaintiffs, the Eleventh Circuit first discussed whether forum non conveniens is substantive or procedural. It then concluded that federal law should apply because a "trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the plaintiff has a valid claim for relief." *Id.* at 1219.

This Court finds the reasoning of *Sibaja* persuasive and therefore applies federal forum non conveniens standards to this action. In *Piper Aircraft v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L.Ed.2d 419 (1981), the Supreme Court stated that under its earlier decisions the principal forum non conveniens inquiry is "convenience." *Id.* at

249. The Court further stated that "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id.*

Traditionally the inquiry focuses upon the "private interest factors" affecting the litigants' convenience and the "public interest factors" affecting the forum's convenience. *Id.* at 258. Private interest factors include the ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining willing witnesses; and the possibility of viewing the premises. Public factors include administrative difficulties, such as applying foreign law. *Id.* at f.6.

Applying these tests mandates dismissal of this action. All of the plaintiffs are citizens of Costa Rica and that is the situs of their alleged injuries. It is undisputed that much of the proof, including their medical records, is found in Costa Rica. Although plaintiffs have offered to bring certain witnesses to this forum at their expense, it is clear that this offer may only apply to "willing" witnesses—and many potential witnesses may not be willing or cooperative with the plaintiffs. It may thus be impossible for this Court to compel the attendance of vital witnesses or to compel the production of sources of proof. The convenience of the litigants could only be impaired by conducting the litigation in this forum.

Furthermore, the public factors bearing upon the administrative difficulties flowing from this action require dismissal. Neither the plaintiffs nor the defendants are citizens of this forum, and plaintiffs' alleged injuries did not occur in the State of California. Yet this Court would

be required to conduct an action in which all of the thirty-four plaintiffs are Spanish-speaking, and many of their physicians (as evidenced by their affidavits) and other important witnesses may also be Spanish-speaking.

This Court would also be placed in the position of applying an unfamiliar law—that of Costa Rica. In *Hurtado v. Superior Court of California*, 11 Cal. 3d 574, 114 Cal. Rptr. 106 (1974), the California Supreme Court held that in determining the law to apply, it would analyze the respective interests of the states involved (governmental interest approach) . . ." *Id.* at 579. In *Hurtado*—where the defendants were California residents, the site of the accident was California, and the plaintiffs had chosen California as their forum—the court held that California law applied.

Under the *Hurtado* analysis, Costa Rica clearly has the more important governmental interest in providing a forum for residents allegedly injured in that country. But except for the most tenuous of claims, there is almost an absence of connections between the plaintiffs and the named defendants and this forum. The fact that in the past California courts may have litigated unrelated-DBCP cases is not sufficient to find that California would have a governmental interest in applying its law. If that were the benchmark for deciding whether a state's law would apply or whether it provided a convenient forum, the doctrines or forum non conveniens and choice of law as we now know them would be eviscerated.

Finally, the plaintiffs contend that Costa Rica does not provide an adequate forum. While the documents submitted by the parties are somewhat contradictory, there does not appear to be any evidence that the plain-

tiffs could not obtain a fair trial in Costa Rica or that tort remedies are not available to them. While discovery may be conducted differently in a civil law country, that is not sufficient basis for requesting that an American court make a value judgment that these procedures are inadequate. Costa Rica provides an adequate forum. The named defendants have agreed to submit themselves to the jurisdiction of Costa Rican courts.

Even if the Court had determined that state law applied, it believes that its response to the forum non conveniens inquiry would have been the same. In *Holmes v. Syntex Laboratories*, 156 Cal. App. 3d 383, 202 Cal. Rptr. 386, an action in which British citizens were suing for injuries they allegedly sustained from drugs sold and ingested by them in England, a California appellate court appeared to restrict those situations in which California courts would dismiss for forum non conveniens.

But in determining that California provided a convenient forum, the court emphasized certain factors: 1) several of the defendants maintained their principal places of business in California; 2) the plaintiffs had alleged that the torts had been committed in California; and 3) the plaintiffs had presented facts demonstrating a connection between the defendants' conduct as it related to their injuries and California. While this showing may be minimal, it is clearly much greater than that found in the case at hand.

III. *CONDITIONS OF DISMISSAL*

Having considered the post-hearing briefs submitted by the parties on the conditions of dismissal, the Court now makes the following order:

1. That the defendants submit to Costa Rican jurisdiction;

2. That the defendants agree to waive any statute of limitations defenses that have arisen during the pendency of this action, i.e., since its commencement in California Superior Court; and

3. That the defendants consent to satisfy any final judgment that may be rendered against them in Costa Rica.

DATED: December 23, 1986

/s/ JOHN G. DAVIES
John G. Davies
United States District Court

APPENDIX I

IN THE
CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

CASE NO. 87-05102

GENERAL JURISDICTION DIVISION

PERFECTO BARRANTES CABALCETA, et al.,
Plaintiff

v.

STANDARD FRUIT COMPANY, et al.,
Defendant

CIVIL ACTION SUMMONS

THE STATE OF FLORIDA:

To Each Sheriff of Said State:

YOU ARE HEREBY COMMANDED to serve this summons and a copy of the complaint or petition in this action on defendant:

SHELL OIL COMPANY
by and through its registered agent of record
C.T. Corporation Systems
8751 W. Broward Blvd.
Plantation, FL

Each defendant is required to serve written defenses to the complaint or petition on Plaintiff's attorney, to wit:

LOUIS S. ROBLES, P.A., whose address is: 75 S.W. 8th Street, Suite 401, Miami, FL 33130

M.Q. 2-12 2:30

within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court either before service on Plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED ON February 4, 1987.

Richard P. Brinker,
as Clerk of said Court

By: /s/ JENNIS L. RUSSELL
as Deputy Clerk

(Court Seal)

IN THE
CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 87-05102

PLAINTIFFS' ORIGINAL COMPLAINT

PEFECTO BARRANTES CABALCETA,

BENITO ALVAREZ ALVAREZ,

HERNAN VALDERDE ROMAN
AND MARIA MONGE CASTILLO,

JOSE PEDRO CARRILLO DOVER
AND IRIS MARIA JIMENEZ,

CARLOS RAMON PEREZ FERNANDEZ,

GERARDO PEREZ TREJOS,

BISAI FENANDEZ DELGADO,

NOE MARENCO IGLESIAS
AND CANDIDA VARGAS VARGAS,

VICTOR MANUEL FUENTES MONGE
AND ISABEL CARRANZA CARRANZA,

MARIO PENA PENA
AND ROSA MARIA MEZA,

REDUCINDO PICADO PORRAS
AND CLARA ERLINDA CASTRO ROLES,

ELIECER BUSTOS RIVERA
AND ANA RODRIGUEZ CASTRO,

VICTOR HUGO MADRIGAL SALAZAR,

ANGEL ANTONIO PEREZ TREJOS
AND TORENA ROTO DIAZ,

JOSE BERMUDEZ VARGAS
AND GRACE MARTINEZ MARTINEZ,

ELIECER PEREZ CAMPOS
AND VICTORIA ROSALES PIJARO,

ADAN MIRANDA CASTRO
AND MARIA ANTONIA OREZO GARCIA,

VICTOR RODRIGUEZ CASTRO
AND FRINDAL GARCIA CARRILLO,

EDWIN TENORIO PENA,

VICTOR MANUEL BUSTOS RUIZ,

JUAN MANUEL ZAMORA ZAMORA,

RAFAEL JIMINEZ CAMPOS,

GERARDO MORA ESPINOZA
AND FLOR MARI BENOCAL MADRIGAL,

JOSE MANUEL CASTRILLO CORTES
AND MELBA GUIDO RIVAS,

SAUL MUNOZ SIBAJA
AND RAFAELA ARRIETA PORRAS,

ROBERTO CERDA AGUILAR
AND SINAI TORRES ROSALES,

VICENTE FLORES VALVERDE
AND MARIA MAYELA VEGA FIGUREROA,

BOLIVAR ARIAS MORA,

ALFONSO CAMPOS RODRIGUEZ
AND MARIA JIMINEZ BENAVIDES,

JUAN BAUTISTA VASQUEZ
AND MARIA ISABEL CHAVARRIA SALAS,

VICTOR SOLIS ROJAS
AND ROSA BADILLA PEREZ,

MIGUEL CHAVARRIA ZUNIGA,

JOAQUIN ZAMORA ARRIETA,

TACITO CAMPOS GARCIA
AND YAMILETH NURIS VILLEGAS DIAS,

SEGUNDO RODRIGUEZ RODRIGUEZ
AND MARY ELIZONDO UMANA,

ELIECER ACOSTA MONTERO
AND EMMA JIMENEZ RAMIREZ,

MANUEL CHAVES NUNEZ
AND MIREYA RODRIGUEZ RODRIGUEZ,

CARLOS GARITA SANDI
AND MELITINA GONZALES,

EDWIN GOMEZ CASTRILLO
AND ODILI TORRES ACUNA,

MAGIN FERNANDEZ GARCIA
AND PAULA CORTEZ GOMEZ,

NEFTALI ARAYA GARITA
AND LEDA ESPINOZA GAMBOA,

MARGARITO ZUNIGA GUTIERREZ
AND ANAIS SANCHEZ ROJAS,

DANIEL LORIA MORERA
AND PETRA BERTA NAVARRETE TORRES,

MIGUEL ZUNIGA PENA
AND MARIA DE LA CRUZ GONZALES GONZALES,

ISIAS SANCHEZ RIVERA
AND FIDELIA ALVARADO SOLORZANO,

AUGUSTO LEITON RODRIGUEZ
AND MERCEDES RODRIGUEZ ARRIETA,

ANGEL LOBO ROJAS
AND MARGOT VARELA RAMIREZ,

CASIMIRO LOPEZ SANDOVAL
AND ALEJANDRINA VEGA VILLALOBOS,

JOSE SOSSA SOSSA
AND FLORY ALFARO JIMENEZ,

ANTONIO GUTIERREZ ZUMBADO
AND MARIA DE LOS ANGELES,

GERARDO PERAZA GARRO
AND NELLY UMANA ARIAS,

ELIAS HERNANDEZ BADILLA,

BENEDICTO CAMPOS CORRALES,

MARIO SOLANO JIMENEZ,

BOLIVAR ARIAS MORA,

PEDRO JIMENEZ MURILLO,

JOSE GAMBOA RODRIGUEZ,

RODRIGO GARITA SANDI,

RODRIGO ESQUIVEL AGUILAR and
ADALI CORDERO ALVARADO;

JOSE ANTONIO ROJAS ARAYA and
AURORA AGUERO;

OLGER CARTIN ARAYA;

OUIDIO AGUERO ARGUELLO and
MARIA ESTER BERMUDEZ ALVARADO;

PORFIRO TREJOS BARRANTES and
ELISABETH SALAS RODRIGUEZ;

JUAN MANUEL JIMENEZ CAMBRONERO and
ELVIVA BELLO LOPEZ;

VASILIO SANCHEZ CARAZO and
VINCENTA GARCIA BARRIENTOS;

CLAUDIO SALAZAR CARBALLO and
DELFINA ALMANZA PEREZ;

RAMON VICTORIANO PEREZ FERNANDEZ and
ALEXA SUAREZ MORALES;

DAGOBERTO ARAYA GARITA;

JOSE ANTONIO ZUNIGA GUTIERREZ and
IRIABEL ESPINOZA RODRIGUEZ;

FRANCISCO MELENDEZ MELENDEZ and
ROSA LIZANO SATRUCH;

ADRIAN GOMEZ MONTERO;

MARIO TULIO VILLALOBOS MURRILLO and
LUZ MARIA AGUERO AGUERO;

OLMAN MIRANDA NUNEZ and
CLARIBEL MIRANDA CAJNA;

GARARDO ESPINOZA RODRIGUEZ and
MARIA SALAZAR BALTODANO;

EDWIN CORRALES ROJAS and
VIRGITA HERNANDEZ ARGUEDAS;

MANUEL SANCHEZ SEGURA and
ALEIDE GONZALEZ MORERA;

VICTOR JULIO RODRIGUEZ VASQUEZ;

DOMINGO CAMPOS ALFARO;

ISMAIL CAMPOS ALPIZAR and
DEYANIRA CORDERO ALVARADO;

OVIDIO MORERA ALVARADO and
FLORINDA ROJAS DURAN;

ALVARO MORERA ALVAREZ and
JEREMY MORERA LOPEZ;

JESUS HERNANEZ BADILLA and
ELIDIETH ROMAN AZOFEIFA;

EDWIN LEON BARBOZA, ET. UX.;

EFRAIM HERRA BARBOZA;

WALDEMAR LOAIZA CALVO;

EDURADO PEREZ CAMPOS and
LUZ MARINA CAMPOS RODRIGUEZ;

CLAUDIO SALAZAR CARBALLO and
DELFINA ALMANZA PEREZ;

JORGE VAZQUEZ CARRILLO and
NOEMY SALINAS SALINAAS;

EFRAIN NUNEZ CASTRO, ET. UX.;

JOEL DINARTE CASTRO;

JORGE CASTRO CASTRO and
NURY BARBOZA MORA;

SERGIO ZAMORA CASTRO and
CLARA MARIA CHAVEZ VARGAS;

ALCIBIADES NUNEZ CESPEDES and
MARIA ESTER MONTERO BOGANTES;

MIGUEL ANGEL STELLER CHAVES and
MARIA DEL SOCORRO SANCHEZ OSES;

DIDIER ARIAS ELIZONDO and
IRENE BARRERA CHAVARRIA;

GREGORIA PEREZ ESPINOZA and
TERESA SANCHEZ ADOLIO;

SIGIFREDO MORALES ESPINOSA;

FRANCISCO ARIAS FALLAS and
MARITZA GOMEZ PEREZ;

RIGOBERTO GARITA GARITA and
MARIA CRISTINA CRUZ MARTINEZ;

MANUEL GOMEZ GOMEZ and
DEYANIRA ENRIQUEZ QUEVARA;

ANGEL SOLANO GONZALES and
LUZ RODRIGUES RAMIREZ;

FRANCISCO MORERA GONZALES and
ELOISA RAMIREZ CAMPOS;

MARCIANO SOLANO GONZALES and
FLORA ELENA FERNANDEZ ROBLES;

ANDRES VEGA GRANADOS and
MARTA JIMENEZ GONZALES;

ALFREDO BERMUDEZ HERNANDEZ and
MARIA LUISA BERMUDEZ ORDONEZ;

JUAN FIGUEROA MATARRITA and
MIREYA PEREZ PEREIRA;

URIEL NUNEZ MOYA and
MIRIAM CARTIN ARAYA;

ELI ORDONEZ MURILLO and
NATIVIDAD ROBLES DURATES;

ISMAEL SALAS NUNEZ and
BASELISA MEDINA MATARRITA;

ANTONIO VILLALOBOS ORTIZ and
MARITZA SOSSA SOSSA;

JORGE VEGA PEREZ;

CARLOS LUIS MUNOZ RAMIREZ;

FRANCISCO RAMIREZ RAMIREZ and
XINIA VINDAS CASTILLO;

VICENTE GUEVARA REYES and
MARIA CECILIA DURAN CORRALES;

GERARDO ESPINOZA RODRIGUEZ;

DANIEL ZUMBADO SALAS and
LEDA MARIA ROSALES ROSALES;

MARIO ZUMBADO SALAS and
ORLENDIA CASCANTE NAVARRO;

RUBEN MORALES SALAZAR and
BLANCA NIEVES ARIAS QUESADA;

ABELINO ROJAS SEQUEIRA;

JOSE OBANDO SEQUEIRA and
JUDITH CAMPOS GONZALEZ;

JOSE SIBAJA SOTA and
BLANCA NIEVES CASCANTE NAVARRO;

ELEI ELIZONDO UMANA and
ROSALIA SOLANO GONZALEZ;

JUAN ELIZONDO UMANA;

ARNOLDO GALLO VALLEJOS;

MANUEL FLORES VALVERDE

Plaintiffs

versus

STANDARD FRUIT COMPANY,
STANDARD FRUIT AND STEAMSHIP COMPANY,
DOLE FRESH FRUIT COMPANY,
CASTLE & COOKE, INC.,
DOW CHEMICAL COMPANY
AND SHELL OIL COMPANY,

Defendants

PLAINTIFFS' ORIGINAL COMPLAINT

COME NOW Plaintiffs PERFECTO BARRANTES CABALCETA, BENITO ALVAREZ ALVAREZ, HERNAN VALDERDE ROMAN AND MARIA MONGE CASTILLO, JOSE PEDRO CARRILLO DOVER AND IRIS MARIA JIMENEZ, CARLOS RAMON PEREZ FERNANDEZ, GERARDO PEREZ TREJOS, BISAI FERNANDEZ DELGADO, NOE MARENCO IGLESIAS AND CANDIDA VARGAS VARGAS, VICTOR MANUEL FUENTES MONGE AND ISABEL CARRANZA CARRANZA, MARIO PENA PENA AND ROSA MARIA MEZA, REDUCINDO PICADO PORRAS AND CLARA ERLINDA CASTRO ROLES, ELIECER BUSTOS RIVERA AND ANA RODRIGUEZ CASTRO, VICTOR HUGO MADRIGAL SALAZAR, ANGEL

ANTONIO PEREZ TREJOS AND TORENA ROTO DIAZ, JOSE BERMUDEZ VARGAS AND GRACE MARTINEZ MARTINEZ, ELIECER PEREZ CAMPOS AND VICTORIA ROSALES PIJARO, ADAN MIRANDA CASTRO AND MARIA ANTONIA OREZO GARCIA, VICTOR RODRIGUEZ CASTRO AND FRINDAL GARCIA CARRILLO, EDWIN TENORIO PENA, VICTOR MANUEL BUSTOS RUIZ, JUAN MANUEL ZAMORA ZAMORA, RAFAEL JIMINEZ CAMPOS, GERARDO MORA ESPINOZA AND FLOR MARI BENOCAL MADRIGAL, JOSE MANUEL CASTRILLO CORTES AND MELBA GUIDO RIVAS, SAUL MUNOZ SIBAJA AND RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR AND SINAI TORRES ROSALES, VINCENTE FLORES VALVERDE AND MARIA MAYELA VEGA FIRURERoA, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ AND MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ AND MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS AND ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA AND YAMILETH NURIS VILLEGAS DIAS, SEGUNDO RODRIGUEZ RODRIGUEZ AND MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO AND EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ AND MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI AND MELITINA GONZALES, EDWIN GOMEZ CASTRILLO AND ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA AND PAULA CORTEZ GOMEZ, NEFTALI ARAYA GARITA AND LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ AND ANAIS

SANCHEZ ROJAS, DANIEL LORIA MORERA AND PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA AND MARIA DE LA CRUZ GONZALES GONZALES, ISAIAS SANCHEZ RIVERA AND FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ AND MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS AND MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL AND ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA AND FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO AND MARIA DE LOS ANGELES, GERARDO PERAZA GARRO AND NELLY UMANA ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI, RODRIGO ESQUIVEL AGUILAR AND ADALI CORDERO ALVARADO; JOSE ANTONIO ROJAS ARAYA AND AURORA AGUERO AGUERO; OLGER CARTIN ARAYA; OUIDIO AGUERO ARGUELLO AND MARIA ESTER BERMUDEZ ALVARADO, PORFIRO TREJOS BARRANTES AND ELISABETH SALAS RODRIGUEZ; JUAN MANUEL JIMENEZ CAMBRONERO AND ELVIVA BELLO LOPEZ; VASILIO SANCHEZ CARAZO AND VINCENTA GARCIA BARRIENTOS; CLAUDIO SALAZAR CARBALLO AND DELFINA ALMANZA PEREZ; RAMON VICTORIANO PEREZ FERNANDEZ AND ALEXA SUAREZ MORALES; DAGOBERTO ARAYA GARITA; JOSE ANTONIO ZUNIGA GUTIERREZ AND IRIABEL ESPINOZA RODRIGUEZ; FRANCISCO MELENDEZ MELENDEZ AND ROSA LIZANO SATRUCH; ADRIAN GOMEZ MON-

TERO; MARIO TULIO VILLALOBOS MURRILLO AND LUZ MARIA AGUERO AGUERO; OLMAN MIRANDA NUNEZ AND CLARIBEL MIRANDA CAJNA; GERARDO ESPINOZA RODRIGUEZ AND MARIA SALAZAR BALTODANO; EDWIN CORRALES ROJAS AND VIRGITA HERNANDEZ ARGUEDAS; MANUEL SANCHEZ SEGURA AND ALEIDE GONZALEZ MORERA; VICTOR JULIO RODRIGUEZ VASQUEZ; DOMINGO CASTRO ALFARO; ISMAIL CAMPOS ALPIZAR AND DEYANIRA CORDERO ALVARADO; OVIDIO MORERA ALVARDO AND FLORINDA ROJAS DURAN; ALVARO MORERA ALVAREZ AND JEREMY MORERA LOPEZ; JESUS HERNANDEZ BADILLA AND ELIDIETH ROMAN AZOFEIFA; EDWIN LEON BARBOZA; EFRAIM HERRA BARBOZA; WALDEMAR LOAIZA CALVO; EDURADO PEREZ CAMPOS AND LUZ MARINA CAMPOS RODRIGUEZ; CLAUDIO SALAZAR CARBALLO AND DELFINA ALMANZA PEREZ; JORGE VAZQUEZ CARRILLO AND NOEMY SALINAAS; EFRAIN NUNEZ CASTRO; JOEL DINARTE CASTRO; JORGE CASTRO CASTRO AND NURY BARBOZA MORA; SERGIO ZAMORA CASTRO AND CLARA MARIA CHAVEZ VARGAS; ALCIBIADES NUNEZ CESPEDES AND MARIA ESTER MONTERO BOGANTES; MIGUEL ANGEL STELLER CHAVES AND MARIA DEL SOCORRO SANCHEZ OSES; DIDIER ARIAS ELIZONDO AND IRENE BARRERA CHAVARRIA; GREGORIA PEREZ ESPINOZA AND TERESA SANCHEZ ADOLIO; SIGFREDO MORALES ESPINOSA; FRANCISCO ARIAS FALLAS AND MARITZA GOMEZ PEREZ; RIGOBERTO GARITA AND MARIA CRISTINA CRUZ MARTINEZ;

MANUEL GOMEZ GOMEZ AND DEYANIRA ENRIQUEZ QUEVARA; ANGEL SOLANO GONZALES AND LUZ RODRIGUES RAMIREZ; FRANCISCO MORERA GONZALEZ AND ELOISA RAMIREZ CAMPOS; MARCIANO SOLANO GONZALEZ AND FLORA ELENA FERNANDEZ ROBLES; ANDRES VEGA GRANADOS AND MARTA JIMENEZ GONZALEZ; ALFREDO BERMUDEZ HERNANDEZ AND MARIA LUISA BERMUDEZ ORDONEZ; JUAN FIGUEROA MATARRITA AND MIREYA PEREZ PEREIRA; URIEL NUNEZ MOYA AND MIRIAM CARTIN ARAYA; ELI ORDONEZ MURILLO AND NATIVIDAD ROBLES DURATES; ISMAEL SALAS NUNEZ AND BASELISA MEDINA MATARRITA; ANTONIO VILLALOBOS ORTIZ AND MARTITZA SOSSA SOSSA; JORGE VEGA PEREZ; CARLOS LUIS MUNOZ RAMIREZ; FRANCISCO RAMIREZ RAMIREZ AND XINIA VINDAS CASTILLO; VICENTE GUEVARA REYES AND MARIA CECILIA DURAN CORRALES; GERARDO ESPINOZA RODRIGUEZ; DANIEL ZUMBADO SALAS AND LEDA MARIA ROSALES ROSALES; MARIO ZUMBADO SALAS AND ORLENDIA CASCANTE NAVARRO; RUBEN MORALES SALAZAR AND BLANCA NIEVES ARIAS QUESADA; ABELINO ROJAS SEQUEIRA; JOSE OBANDO SEQUEIRA AND JUDITH CAMPOS GONZALEZ; JOSE SIBAJA SOTA AND BLANCA NIEVES CASCANTE NAVARRO; ELEI ELIZONDO UMANA AND ROSALIA SOLANO GONZALEZ; JUAN ELIZONDO UMANA; ARNOLDO GALLO VALLEJOS; and MANUEL FLORES VALVERDE, and file this their Original Complaint against the Defendants and allege as follows:

1. This is an action for damages in excess of the sum of Five Thousand and No/100 ($5,000.00) dollars.

2 Plaintiffs are citizens and residents of Costa Rica. Defendants are doing business in, and are residents of Dade County, Florida. Therefore, venue is proper in this Court under FLA. STAT. ANN. § 47.051.

3. Defendant STANDARD FRUIT COMPANY is a Delaware corporation with its corporate headquarters located at 2300 Glades Road, East Tower, Boca Raton, Florida, 33431-0980. Plaintiffs allege that during all times material to this action, this Defendant has transacted substantial business in the State of Florida from which it has derived substantial revenues. This Defendant can be served at its corporate headquarters pursuant to FLA. STAT. ANN. §§ 48.081(1)(d) and (2).

4. Defendant STANDARD FRUIT AND STEAMSHIP COMPANY is a Delaware corporation qualified to transact business in the State of Florida. Service of process of such Defendant is predicated on FLA. STAT. ANN. § 48.081(3) and FLA. STAT. ANN. § 48.091. (Defendant's resident agent designated for service of process pursuant to § 48.091 is CT Corporation Systems, 8751 West Broward Boulevard, Plantation, Florida 33324.

5. Defendant DOLE FRESH FRUIT COMPANY is a Nevada corporation qualified to transact business in the State of Florida. Service of process of such Defendant is predicated on FLA. STAT. ANN. § 48.081(3) and FLA. STAT. ANN. § 48.091. Defendant's resident agent designated for service of process pursuant to § 48.091 is CT Corporation Systems, 8751 West Broward Boulevard, Plantation, Florida 33324.

6. Defendant CASTLE & COOKE, INC. is a Hawaii corporation qualified to transact business in the State of Florida. Service of process of such Defendant is predicated on FLA. STAT. ANN. § 48.081(3) and FLA. STAT. ANN. § 48.091. Defendant's resident agent designated for service of process pursuant to § 48.091 is CT Corporation Systems, 8751 West Broward Boulevard, Plantation, Florida 33324.

7. Defendant DOW CHEMICAL COMPANY is a Delaware corporation qualified to transact business in the State of Florida. Service of process of such Defendant is predicated on FLA. STAT. ANN. § 48.081(3) and FLA. STAT. ANN. § 48.091. Defendant's resident agent designated for service of process pursuant to § 48.091 is CT Corporation Systems, 8751 West Broward Boulevard, Plantation. Florida 33324.

8. Defendant SHELL OIL COMPANY is a Delaware corporation qualified to transact business in the State of Florida. Service of process of such Defendant is predicated on FLA. STAT. ANN. § 48.081(3) and FLA. STAT. ANN. § 48.091. Defendant's resident agent designated for service of process pursuant to § 48.091 is CT Corporation Systems, 8751 West Broward Boulevard, Plantation, Florida 33324.

9. This cause of action is predicated on negligence and intentional tort theories and on products liability theories of strict liability, implied warranty and negligence, as more specifically alleged herein. The products complained of are nematocides containing the chemical dibromochloropropane, or DBCP. The product manufactured, sold and distributed by the Defendant Dow Chemical Company was marketed under the trade name

"Fumazone." The product manufactured, sold and distributed by the Defendant Shell Oil Company was marketed under the trade name "Nemagon."

10. Plaintiffs PERFECTO BARRANTES CABALCETA, BENITO ALVAREZ ALVAREZ, HERNAN VALDERDE ROMAN AND MARIA MONGE CASTILLO, JOSE PEDRO CARRILLO DOVER AND IRIS MARIA JIMENEZ, CARLOS RAMON PEREZ FERNANDEZ, GERARDO PEREZ TREJOS, BISAI FERNANDEZ DELGADO, NOE MARENCO IGLESIAS AND CANDIDA VARGAS VARGAS, VICTOR MANUEL FUENTES MONGE AND ISABEL CARRANZA CARRANZA, MARIO PENA PENA AND ROSA MARIA MEZA, REDUCINDO PICADO PORRAS AND CLARA ERLINDA CASTRO ROLES, ELIECER BUSTOS RIVERA AND ANA RODRIGUEZ CASTRO, VICTOR HUGO MADRIGAL SALAZAR, ANGEL ANTONIO PEREZ TREJOS AND TORENA ROTO DIAZ, JOSE BERMUDEZ VARGAS AND GRACE MARTINEZ, ELIECER PEREZ CAMPOS AND VICTORIA ROSALES PIJARO, ADAN MIRANDA CASTRO AND MARIA ANTONIA OREZO GARCIA, VICTOR RODRIGUEZ CASTRO AND FRINDAL GARCIA CARRILLO, EDWIN TENORIO PENA, VICTOR MANUEL BUSTOS RUIZ, JUAN MANUEL ZAMORA ZAMORA, RAFAEL JIMINEZ CAMPOS, GERARDO MORA ESPINOZA AND FLOR MARI BENOCAL MADRIGAL, JOSE MANUEL CASTRILLO CORTES AND MELBA GUIDO RIVAS, SAUL MUNOZ SIBAJA AND RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR AND SINAI TORRES ROSALES, VICENTE FLORES VALVERDE AND MARIA MAYELA VEGA FIGUREROA, BOLI-

VAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ AND MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ AND MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS AND ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA AND YAMILETH NURIS VILLEGAS DIAS, SEGUNDO RODRIGUEZ AND MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO AND EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ AND MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI AND MELITINA GONZALES, EDWIN GOMEZ CASTRILLO AND ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA AND PAULA CORTEZ GOMEZ, NEFTALI ARAYA GARITA AND LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ AND ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA AND PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA AND MARIA DE LA CRUZ GONZALES, ISAIAS SANCHEZ RIVERA AND FIDELIA ALVARADO SOLORZONO, AUGUSTO LEITON RODRIGUEZ AND MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS AND MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL AND ALEJANDRIA VEGA VILLALOBOS, JOSE SOSSA SOSSA AND FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO AND MARIA DE LOS ANGELES, GERARDO PERAZA GARRO AND NELLY UMANA ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO, JOSE GAMBOA

RODRIGUEZ, RODRIGO GARITA SANDI, RODRIGO ESQUIVEL AGUILAR AND ADALI CORDERO ALVARADO; JOSE ANTONIO ROJAS ARAYA AND AURORA AGUERO AGUERO; OLGER CARTIN ARAYA; QUIDIO AGUERO ARGUELLO AND MARIA ESTER BERMUDEZ ALVARADO; PORFIRO TREJOS BARRANTES AND ELISABETH SALAS RODRIGUEZ; JUAN MANUEL JIMENEZ CAMBRONERO AND ELVIVA BELLO LOPEZ; VASILIO SANCHEZ CARAZO AND VINCENTA GARCIA BARRIENTOS; CLAUDIO SALAZAR CARABALLO AND DELFINA ALMANZA PEREZ; RAMON VICTORIANO PEREZ FERNANDEZ AND ALEXA SUAREZ MORALES; DAGOBERTO ARAYA GARITA; JOSE ANTONIO ZUNIGA GUTIERREZ AND IRIABEL ESPINOZA RODRIGUEZ; FRANCISCO MELENDEZ MELENDEZ AND ROSA LIZANO SATRUCH; ADRIAN GOMEZ MONTERO; MARIO TULIO VILLALOBOS MURRILLO AND LUZ MARIA AGUERO AGUERO; OLMAN MIRANDA NUNEZ AND CLARIBEL MIRANDA CAJNA; GERARDO ESPINOZA RODRIGUEZ AND MARIA SALAZAR BALTODANO; EDWIN CORRALES ROJAS AND VIRGITA HERNANDEZ ARGUEDAS; MANUEL SANCHEZ SEGURA AND ALEIDE GONZALEZ MORERA; VICTOR JULIO RODRIGUEZ VASQUEZ; DOMINGO CASTRO ALFARO; ISMAIL CAMPOS ALPIZAR AND DEYANIRA CORDERO ALVARADO; OVIDIO MORERA ALVARADO AND FLORINDA ROJAS DURAN; ALVARO MORERA ALVAREZ AND JEREMY MORERA LOPEZ; JESUS HERNANDEZ BADILLA AND ELIDIETH ROMAN AZOFEIFA; EDWIN LEON BARBOZA; EFRAIM HERRA

BARBOZA; WALDEMAR LOAIZA CALVO; EDUARADO PEREZ CAMPOS AND LUZ MARINA CAMPOS RODRIGUEZ; CLAUDIO SALAZAR CARBALLO AND DELFINA ALMANZA PEREZ; JORGE VAZQUEZ CARRILLO AND NOEMY SALINAS SALINAAS; EFRAIN NUNEZ CASTRO; JOEL DINARTE CASTRO; JORGE CASTRO CASTRO AND NURY BARBOZA MORA; SERGIO ZAMORA CASTRO AND CLARA MARIA CHAVEZ VARGAS; ALCIBIADES NUNEZ CESPEDES AND MARIA ESTER MONTERO BOGANTES; MIGUEL ANGEL STELLER CHAVES AND MARIA DEL SOCORRO SANCHEZ OSES; DIDIER ARIAS ELIZONDO AND IRENE BARRERA CHAVARRIA; GREGORIA PEREZ ESPINOZA AND TERESA SANCHEZ ADOLIO; SIGIFREDO MORALES ESPINOSA; FRANCISCO ARIAS FALLAS AND MARITZA GOMEZ PEREZ; RIGOBERTO GARITA GARITA AND MARIA CRISTINA CRUZ MARTINEZ; MANUEL GOMEZ GOMEZ AND DEYANIRA ENRIQUEZ QUEVARA; ANGEL SOLANO GONZALES AND LUZ RODRIGUES RAMIREZ; FRANCISCO MORERA GONZALEZ AND ELOISA RAMIREZ CAMPOS; MARCIANO SOLANO GONZALEZ AND FLORA ELENA FERNANDEZ ROBLES; ANDRES VEGA GRANADOS AND MARTA JIMENEZ GONZALES; ALFREDO BERMUDEZ HERNANDEZ AND MARIA LUISA BERMUDEZ ORDONEZ; JUAN FIGUEROA MATARRITA AND MIREYA PEREZ PEREIRA; URIEL NUNEZ MOYA AND MIRIAM CARTIN ARAYA; ELI ORDONEZ MURILLO AND NATIVIDAD ROBLES DURATES; ISMAEL SALAS NUNEZ AND BASELISA MEDINA MATARRITA; ANTONIO VIL-

LALOBOS ORTIZ AND MARITZA SOSSA SOSSA; JORGE VEGA PEREZ; CARLOS LUIS MUNOZ RAMIREZ; FRANCISCO RAMIREZ AND XINIA VINDAS CASTILLO; VICENTE GUEVARA REYES AND MARIA CECILIA DURAN CORRALES; GERARDO ESPINOZA RODRIGUEZ; DANIEL ZUMBADO SALAS AND LEDA MARIA ROSALES ROSALES; MARIO ZUMBADO SALAS AND ORLENDIA CASCANTE NAVARRO; RUBEN MORALES SALAZAR AND BLANCA NIEVES ARIAS QUESADA; ABELINO ROJAS SEQUEIRA; JOSE OBANDO SEQUEIRA AND JUDITH CAMPOS GONZALEZ; JOSE SIBAJA SOTA AND BLANCA NIEVES CASCANTE NAVARRO; ELEI ELIZONDO UMANA AND ROSALIA SOLANO GONZALEZ; JUAN ELIZONDO UMANA; ARNOLDO GALLO VALLEJOS; and MANUEL FLORES VALVERDE, allege that they were exposed to Fumazone and Nemagon in years up to and including the early 1980's and as a result of such exposure have suffered serious and permanent mental and physical injuries including, but not limited to, loss of reproductive function. Plaintiffs also have an extraordinarily increased risk of other diseases, including but not limited to stomach cancer and other forms of cancer. Spousal Plaintiffs have suffered loss of consortium. The exposed Plaintiffs came into contact with dibromochloropropane while working on banana plantations operated by Defendant Standard Fruit Company in Costa Rica.

NEGLIGENCE

11. All of the allegations in paragraphs 1 through 10 are realleged herein.

12. The injuries of Plaintiffs are a direct and proximate result of the negligence of Defendants Dow Chemical Company and Shell Oil Company in that said Defendants sold and/or otherwise put into the stream of interstate and international commerce, DBCP-containing materials which said Defendants knew, or in the exercise of ordinary care sought to have known, were deleterious and highly harmful to said Plaintiffs' health and well being. The Defendants were negligent in one, some and/or all of the following respects, these being the proximate causes of said Plaintiffs' illnesses and disabilities.

(a) In failing to adequately warn Plaintiffs of the dangerous characteristics of DBCP;

(b) In failing to inform Plaintiffs of safe protective clothing and equipment, if any existed, to prevent Plaintiffs from being harmed by DBCP;

(c) In failing to place adequate warnings on the containers of the aforementioned DBCP-containing products to warn of the hazards of contact with DBCP.

(d) In failing to exercise reasonable care to publish, adopt and enforce a safety plan or manual for handling and applying DBCP-containing products;

(e) In failing to develop and use a substitute material for DBCP in the aforementioned products; and

(f) In failing to test DBCP prior to releasing these products for sale.

13. The injuries of Plaintiffs are also due to the negligence of Defendants Standard Fruit Company, Dole Fresh Fruit Company, Castle & Cooke, Inc., and Standard Fruit and Steamship Company in failing to exercise reasonable

care to prevent Plaintiffs' harmful exposure to DBCP-containing products which Defendants knew or should have known were hazardous to Plaintiffs. Defendants were negligent in the following particulars:

(a) In failing adequately to supervise and instruct Plaintiffs in the safe and proper application of DBCP-containing products;

(b) In failing to implement proper methods and techniques of application of said products;

(c) In failing to instruct Plaintiffs in and enforce the wearing of adequate protective clothing and equipment during the application of said products;

(d) In failing to warn Plaintiffs of the hazards of exposure to said products;

(e) In failing to test said products for possible adverse health effects;

(f) In concealing from Plaintiffs information concerning the observed effects of said products on Plaintiffs and their co-workers;

(g) In failing adequately to monitor the health of Plaintiffs exposed to said products;

(h) In failing to place adequate labels on containers of said products to warn of the dangers of said products; and

(i) In failing to use substitute nematocides for said products.

STRICT LIABILITY

14. All of the allegations contained in paragraphs 1 through 13 are realleged herein.

15. The DBCP-containing products that were used and applied by Plaintiffs were designed and manufactured by Defendant Dow Chemical Company and Shell Oil Company and subsequently sold, directly and indirectly, to the employers of Plaintiffs. These products left the hands of said Defendants in a defective and unreasonably dangerous condition in the following respects:

(a) Said DBCP-containing products did not contain an adequate and timely warning regarding the serious health hazards associated with DBCP;

(b) Said products did not contain an adequate and timely warning to the effect that protective equipment should be used when working with DBCP;

(c) Said products were defectively designed in that they contained DBCP although a substitute for this chemical was available at all times material to this litigation.

(d) Said products were defectively designed in that they did not contain an adequate and timely warning concerning the hazards of DBCP and the need for safety precautions when using DBCP; and

(e) Said products were unreasonably dangerous *per se*.

16. Defendants Dow Chemical Company and Shell Oil Company are and/or were engaged in the business of manufacturing and/or distributing such DBCP-containing products and these products, without substantial change in condition after they were sold, were a producing cause of the damages sustained by Plaintiffs.

17. Plaintiffs were unaware of the dangerous propensities of the products which rendered them unsafe for their intended use. Plaintiffs used the aforementioned

products in a manner that was reasonably anticipated by the Defendants. Further, during the periods that said Plaintiffs were exposed to the products of the Defendants, said products were being utilized in a manner which was intended by Defendants.

IMPLIED WARRANTY

18. All of the allegations contained in paragraphs 1 through 17 are realleged herein.

19. Defendants Dow Chemical Company and Shell Oil Company impliedly warranted that their DBCP-containing products were of good and merchantable quality and fit for their intended use.

20. The Plaintiffs would show that they worked in close proximity to the DBCP-containing products of the Defendants and their presence was known or ought to have been reasonably anticipated by the Defendants. The implied warranty made by the Defendants that their aforesaid products were of a good and merchantable quality and were fit for their particular intended use was breached in that Plaintiffs' work with Defendants' products caused them to be exposed to DBCP and to be injured as a proximate result thereof.

INTENTIONAL TORT

21. All of the allegations contained in paragraphs 1 through 20 are realleged herein.

22. The injuries of Plaintiffs are also due to the intentional malfeasance of Defendants Standard Fruit Company, Standard Fruit and Steamship Company, Dole Fresh Fruit Company and Castle & Cooke, Inc. and are the direct and proximate results of these Defendants' voli-

tional acts. Each of these Defendants knew of the danger posed by DBCP-containing products, yet knowingly, consciously and with substantial certainty of the consequences of their actions proximately caused Plaintiffs injuries in the following respects:

(a) Defendants knowingly concealed information concerning the observed health effects of DBCP-containing products from Plaintiffs;

(b) Defendants knew of the hazards posed by DBCP-containing products yet used said products in the operations involving Plaintiffs;

(c) Defendants knew of the hazards posed by DBCP-containing products and by the methods of application used yet continued to use these methods;

(d) Defendants knew of the hazards posed by DBCP-containing products yet failed to provide adequate protective clothing and equipment to Plaintiffs; and

(e) Defendants knew of the hazards posed by DBCP-containing products yet did not instruct Plaintiffs in proper application techniques.

COMPENSATORY DAMAGES

23. As a direct and proximate result of Defendants tortious conduct as aforesaid, Plaintiffs PERFECTO BARRANTES CABALCETA, BENITO ALVAREZ ALVAREZ, HERNAN VALDERDE ROMAN AND MARIA MONGE CASTILLO, JOSE PEDRO CARRILLO DOVER AND IRIS MARIA JIMENEZ, CARLOS RAMON PEREZ FERNANDEZ, GERARDO PEREZ TREJOS, BISAI FERNANDEZ DELGADO, NOE MARENCO IGLESIAS AND CANDIDA VARGAS VARGAS,

VICTOR MANUEL FUENTES MONGE AND ISABEL CARRANZA CARRANZA, MARIO PENA PENA AND ROSA MARIA MEZA, REDUCINDO PICADO PORRAS AND CLARA ERLINDA CASTRO ROLES, ELIECER BUSTOS RIVERA AND ANA RODRIGUEZ CASTRO, VICTOR HUGO MADRIGAL SALAZAR, ANGEL ANTONIO PEREZ TREJOS AND TORENA ROTO DIAZ, JOSE BERMUDEZ VARGAS AND GRACE MARTINEZ MARTINEZ, ELIECER PEREZ CAMPOS AND VICTORIA ROSALES PIJARO, ADAN MIRANDA CASTRO AND MARIA ANTONIA OREZO GARCIA, VICTOR RODRIGUEZ CASTRO AND FRINDAL GARCIA CARRILLO, EDWIN TENORIO PENA, VICTOR MANUEL BUSTOS RUIZ, JUAN MANUEL ZAMORA ZAMORA, RAFAEL JIMINEZ CAMPOS, GERARDO MORA ESPINOZA AND FLOR MARI BENOCAL MADRIGAL, JOSE MANUEL CASTRILLO CORTES AND MELBA GUIDO RIVAS, SAUL MUNOZ SIBAJA AND RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR AND SINAI TORRES ROSALES, VICENTE FLORES VALVERDE AND MARIA MAYELA VEGA FIGUREROA; BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ AND MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ AND MARIA ISABEL CHAVARRI'A SALAS, VICTOR SOLIS ROJAS AND ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA AND YAMILETH NURIS VILLEGAS DIAS, SEGUNDO RODRIGUEZ RODRIGUEZ AND MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO AND EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ AND MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GA-

RITA SANDI AND MELITINA GONZALES, EDWIN GOMEZ CASTRILLO AND ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA AND PAULA CORTEZ GOMEZ, NEFTALI ARAYA GARITA AND LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ AND ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA AND PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA AND MARIA DE LA CRUZ GONZALES GONZALES, ISAIAS SANCHEZ RIVERA AND FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ AND MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS AND MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL AND ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA SOSSA AND FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO AND MARIA DE LOS ANGELES, GERARDO PERAZA GARRO AND NELLY UMANA ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI, RODRIGO ESQUIVEL AGUILAR AND ADALI CORDERO ALVARADO; JOSE ANTONIO ROJAS ARAYA AND AURORA AGUERO AGUERO; OLGER CARTIN ARAYA; OUIDIO AGUERO ARGUELLO AND MARIA ESTER BERMUDEZ ALVARADO; PORFIRO TREJOS BARRANTES AND ELISABETH SALAS RODRIGUEZ; JUAN MANUEL JIMENEZ CAMBRONERO AND ELVIVA BELLO LOPEZ; VASILIO SANCHEZ CARAZO AND VINCENTA GARCIA BARRIENTOS; CLAUDIO SALAZAR CARBALLO AND DELFINA

ALMANZA PEREZ; RAMON VICTORIANO PEREZ FERNANDEZ AND ALEXA SUAREZ MORALES; DAGOBERTO ARAYA GARITA; JOSE ANTONIO ZUNIGA GUTIERREZ AND IRIABEL ESPINOZA RODRIGUEZ; FRANCISCO MELENDEZ MELENDEZ AND ROSA LIZANO SATRUCH; ADRIAN GOMEZ MONTERO; MARIO TULIO VILLALOBOS MURRILLO AND LUZ MARIA AGUERO AGUERO; OLMAN MIRANDA NUNEZ AND CLARIBEL MIRANDA CAJNA; GERARDO ESPINOZA RODRIGUEZ AND MARIA SALAZAR BALTODANO; EDWIN CORRALES ROJAS AND VIRGITA HERNANDEZ ARGUEDAS; MANUEL SANCHEZ SEGURA AND ALEIDE GONZALEZ MORERA; VICTOR JULIO RODRIGUEZ VASQUEZ; DOMINGO CASTRO ALFARO; ISMAIL CAMPOS ALPIZAR AND DEYANIRA CORDERO ALVARADO; OVIDIO MORERA ALVARADO AND FLORINDA ROJAS DURAN; ALVARO MORERA ALVAREZ AND JEREMY MORERA LOPEZ; JESUS HERNANDEZ BADILLA AND ELIDIETH ROMAN AZOFEIFA; EDWIN LEON BARBOZA; EFRAIM HERRA BARBOZA; WALDEMAR LOAIZA CALVO; EDURADO PEREZ CAMPOS AND LUZ MARINA CAMPOS RODRIGUEZ; CLAUDIO SALAZAR CARBALLO AND DELFINA ALMANZA PEREZ; JORGE VAZQUEZ CARRILLO AND NOEMY SALINAS SALINAAS; EFRAIN NUNEZ CASTRO; JOEL DINARTE CASTRO; JORGE CASTRO CASTRO AND NURY BARBOZA MORA; SERGIO ZAMORA CASTRO AND CLARA MARIA CHAVEZ VARGAS; ALCIBIADES NUNEZ CESPEDES AND MARIA ESTER MONTERO BOGANTES; MIGUEL ANGEL STELLER CHAVES AND

MARIA DEL SOCORRO SANCHEZ OSES; DIDIER ARIAS ELIZONDO AND IRENE BARRERA CHAVARRIA; GREGORIA PEREZ ESPINOZA AND TERESA SANCHEZ ADOLIO; SIGIFREDO MORALES ESPINOSA; FRANCISCO ARIAS FALLAS AND MARITZA GOMEZ PEREZ; RIGOBERTO GARITA GARITA AND MARIA CRISTINA CRUZ MARTINEZ; MANUEL GOMEZ GOMEZ AND DEYANIRA ENRIQUEZ QUEVARA; ANGEL SOLANO GONZALES AND LUZ RODIGUES RAMIREZ; FRANCISCO MORERA GONZALEZ AND ELOISA RAMIREZ CAMPOS; MARCIANO SOLANO GONZALEZ AND FLORA ELENA FERNANDEZ ROBLES; ANDRES VEGA GRANADOS AND MARTA JIMENEZ GONZALES; ALFREDO BERMUDEZ HERNANDEZ AND MARIA LUISA BERMUDEZ ORDONEZ; JUAN FIGUEROA MATARRITA AND MIREYA PEREZ PEREIRA; URIEL NUNEZ MOYA AND MIRIAM CARTIN ARAYA; ELI ORDONEZ MURILLO AND NATIVIDAD ROBLES DURATES; ISMAEL SALAS NUNEZ AND BASELISA MEDINA MATARRITA; ANTONIO VILLALOBOS ORTIZ AND MARITZA SOSSA SOSSA; JORGE VEGA PEREZ; CARLOS LUIS MUNOZ RAMIREZ; FRANCISCO RAMIREZ RAMIREZ AND XINIA VINDAS CASTILLO; VICENTE GUEVARA REYES AND MARIA CECILIA DURAN CORRALES; GERARDO ESPINOZA RODRIGUEZ; DANIEL ZUMBADO SALAS AND LEDA MARIA ROSALES ROSALES; MARIO ZUMBADO SALAS AND ORLENDIA CASCANTE NAVARRO; RUBEN MORALES SALAZAR AND BLANCA NIEVES ARIAS QUESADA; ABELINO ROJAS SEQUEIRA; JOSE OBANDO SEQUEIRA AND JUDITH CAMPOS GONZALEZ; JOSE SIBAJA SOTA AND BLANCA NIEVES CASCANTE NAVARRO; ELEI ELIZONDO UMANA AND ROSALIA SOLANO GONZALEZ; JUAN ELIZONDO UMANA; ARNOLDO GALLO VALLEJOS; and MANUEL FLORES VALVERDE, have been damaged in the following particulars for all of which suit is herein brought:

(a) Plaintiffs have sustained a total and permanent loss of reproductive function and have sustained and will always suffer great sexual impairment;

(b) Said Plaintiffs have suffered great physical pain and mental anguish and will continue to suffer great pain of body and mind throughout their lifetime;

(c) Plaintiffs have incurred and will continue to incur hospital, medical, pharmaceutical and other expenses in the future due to their exposure to aforesaid products;

(d) Plaintiffs suffer an extraordinarily increased likelihood of developing cancer as a result of their exposure to aforesaid products;

(e) Plaintiffs suffer an extraordinarily increased risk of genetic damage as a result of their exposure to aforesaid products;

(f) Plaintiffs will suffer a loss of earning capacity due to their exposure to said DBCP-containing products;

(g) Plaintiffs will incur expenses for domestic help and nursing care in the future due to their exposure to Defendants' aforesaid products;

(h) Plaintiffs have lost the capacity to enjoy a full and normal life and will continue to suffer such loss in the future due to their exposure to aforesaid products:

(i) Plaintiffs MARIA MONGE CASTILLO, IRIS MARIA JIMENEZ, CANDIDA VARGAS, ISABEL CARRANZA CARRANZA, ROSA MARIA MEZA, CLARA ERLINDA CASTRO ROLES, ANA RODRIGUEZ CASTRO, TORENA ROTO DIAZ, GRACE MARTINEZ MARTINEZ, VICTORIA ROSALES PIJARO, MARIA ANTONIO OREZO GARCIA, FRINDAL GARCIA CARRILLO, FLOR MARI BENOCAL MADRIGAL, MELBA GUIDO RIVAS, RAFAELA ARRITA PORRAS, SINAI TORRES ROSALES, MARIA MAYELA VEGA FIGUREROA, MARIA JIMENEZ BENAVIDES, MARIA ISABEL CHAVARRIA SALAS, ROSA BADILLA PEREZ, YAMILETH NURIS VILLEGAS DIAS, MARY ELIZONDO UMANA, EMMA JIMENEZ RAMIREZ, MIREYA RODRIGUEZ, MELITINA GONZALES, ODILI TORRES ACUNA, PAULA CORTEZ GOMEZ, LEDA ESPINOZA GAMBOA, ANAIS SANCHEZ ROJAS, PETRA BERTA NAVARRETE TORRES, MARIA DE LA CRUZ GONZALES GONZALES, FIDELIA ALVARADO SOLORZANO, MERCEDES RODRIGUEZ ARRIETA, MARGOT VARELA RAMIREZ, ALEJANDRINA VEGA VILLALOBOS, FLORY ALFARO JIMENEZ, MARIA DE LOS ANGELES, NELLY UMANA ARIAS, ADALI CORDERO ALVARADO; AURORA AGUERO AGUERO; MARIA ESTER BERMUDEZ ALVARADO; ELISABETH SALAS RODRIGUEZ; ELVIVA BELLO LOPEZ; VINCENTE GARCIA BARRIENTOS; DELFINA ALMANZA PEREZ; ALEXA SUAREZ MORALES; IRIABEL ESPINOZA RODRIGUEZ; ROSA LIZANO SATRUCH; LUZ MARIA AGUERO AGUERO; CLARIBEL MIRANDA CAJNA; MARIA SALAZAR BALTODANO; VIRGITA HERNANDEZ ARGU-

EDAS; ALEIDE GONZALEZ MORERA; DEYANIRA CORDERO ALVARADO; FLORINDA ROJAS DURAN; JEREMY MORERA LOPEZ; ELIDIETH ROMAN AZOFEIFA; LUZ MARINA CAMPOS RODRIGUEZ; DELFINA ALMANZA PEREZ; NOEMY SALINAS SALINAAS; NURY BARBOZA MORA; CLARA MARIA CHAVEZ VARGAS; MARIA ESTER MONTERO BOGANTES; MARIA DEL SOCORRO SANCHEZ OSES; IRENE BARRERA CHAVARRIA; TERESA SANCHEZ ADOLIO; MARITZA GOMEZ PEREZ; MARIA CRISTINA CRUZ MARTINEZ; DEYANIRA ENRIQUEZ QUEVARA; LUZ RODRIGUES RAMIREZ; ELOISA RAMIREZ CAMPOS; FLORA ELENA FERNANDEZ ROBLES; MARTA JIMENEZ GONZALES; MARIA LUISA BERMUDEZ ORDONEZ; MIREYA PEREZ PEREIRA; MIRIAM CARTIN ARAYA; NATIVIDAD ROBLES DURATES; BASELISA MEDINA MATARRITA; MARITZA SOSSA SOSSA; XINIA VINDAS CASTILLO; MARIA CECILIA DURAN CORRALES, LEDA MARIA ROSALES ROSALES; ORLENDIA CASCANTE NAVARRO; BLANCA NIEVES ARIAS QUESADA; JUDITH CAMPOS GONZALEZ; BLANCA NIEVES CASCANTE NAVARRO; ROSALIA SOLANO GONZALEZ; have suffered and will continue to suffer the loss of their husbands' services, consortium, financial support and the care and comfort of their society because of their said injuries and disabilities, and said wives will incur expenses for medical and nursing attention rendered to their said husbands in the fture.

EXEMPLARY DAMAGES

24. The Plaintiffs would show that the damages incurred as described herein were directly and proximately

caused by the willful, malicious and intentional acts and omissions, conscious indifference, and utter disregard for the welfare of the said Plaintiffs on the part of the Defendants herein, their agents, servants, employees, managers, superintendents, supervisors, and officers in that they ignored and concealed evidence available to them which indicated that DBCP and DBCP-containing materials were harmful and deadly to persons coming in contact with said materials and in that they willfully, maliciously, intentionally and recklessly continued to require and allow Plaintiffs to be exposed to aforesaid substances and products. Plaintiffs would show that as a result of such conduct as Defendants, they should be awarded an amount that would punish Defendants and act as a deterrent to Defendants and others from the commission of similar wrongs.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs PERFECTO BARRANTES CABALCETA, BENITO ALVAREZ ALVAREZ, HERNAN VALDERDE ROMAN AND MARIA MONGE CASTILLO, JOSE PEDRO CARRILLO DOVER AND IRIS MARIA JIMENEZ, CARLOS RAMON PEREZ FERNANDEZ, GERARDO PEREZ TREJOS, BISAI FERNANDEZ DELGADO, NOE MARENCO IGLESIAS AND CANDIDA VARGAS VARGAS, VICTOR MANUEL FUENTES MONGE AND ISABEL CARRANZA CARRANZA, MARIO PENA PENA AND ROSAS MARIA MEZA, REDUCINDO PICADO PORRAS AND CLARA ERLINDA CASTRO ROLES, ELIECER BUSTOS RIVERA AND ANA RODRIGUEZ CASTRO, VICTOR HUGO MADRIGAL SALAZAR, ANGEL ANTONIO PEREZ TREJOS AND TORENA ROTO DIAZ, JOSE BERMUDEZ VARGAS AND GRACE MARTINEZ

MARTINEZ, ELIECER PEREZ CAMPOS AND VICTORIA ROSALES PIJARO, ADAN MIRANDA CASTRO AND MARIA ANTONIO OREZO GARCIA, VICTOR RODRIGUEZ CASTRO AND FRINDAL GARCIA CARRILLO, EDWIN TENORIO PENA, VICTOR MANUEL BUSTOS RUIZ, JUAN MANUEL ZAMORA, RAFAEL JIMINEZ CAMPOS, GERARDO MORA ESPINOZA AND FLOR MARI BENOCAL MADRIGAL, JOSE MANUEL CASTRILLO CORTES AND MELBA GUIDO RIVAS, SAUL MUNOZ SIBAJA AND RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR AND SINAI TORRES ROSALES, VICENTE FLORES VALVERDE AND MARIA MAYELA VEGA FIGUREROA, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ AND MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ AND MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS AND ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA AND YAMILETH NURIS VILLEGAS DIAS, SEGUNDO RODRIGUEZ RODRIGUEZ AND MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO AND EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ AND MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI AND MELITINA GONZALES, EDWIN GOMEZ CASTRILLO AND ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA AND PAULA CORTEZ GOMEZ, NEFTALI ARAYA GARITA AND LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ AND ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA AND PETRA BERTA NAVARRETE TORRES, MIGUEL

ZUNIGA PENA AND MARIA DE LA CRUZ GONZALES GONZALES, ISAIAS SANCHEZ RIVERA AND FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ AND MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS AND MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL AND ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA SOSSA AND FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO AND MARIA DE LOS ANGELES, GERARDO PERAZA GARRO AND NELLY UMANA ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI, RODRIGO ESQUIVEL AGUILAR AND ADALI CORDERO ALVARADO; JOSE ANTONIO ROJAS ARAYA AND AURORA AGUERO AGUERO; OLGER CARTIN ARAYA ;OUIDIO AGUERO ARGUELLO AND MARIA ESTER BERMUDEZ ALVARADO; PORFIRO TREJOS BARRANTES AND ELISABETH SALAS RODRIGUEZ; JUAN MANUEL JIMENEZ CAMBRONERO AND ELVIVA BELLO LOPEZ; VASILIO SANCHEZ CARAZO AND VINCENTA GARCIA BARRIENTOS; CLAUDIO SALAZAR ÇARBALLO AND DELFINA ALMANZA PEREZ; RAMON VICTORIANO PEREZ FERNANDEZ AND ALEXA SUAREZ MORALES; DAGOBERTO ARAYA GARITA; JOSE ANTONIO ZUNIGA GUTIERREZ AND IRIABEL ESPINOZA RODRIGUEZ; FRANCISCO MELENDEZ MELENDEZ AND ROSA LIZANO SATRUCH; ADRIAN GOMEZ MONTERO; MARIO TULIO VILLALOBOS MURRILLO AND LUZ MARIA

AGUERO AGUERO; OLMAN MIRANDA NUNEZ AND CLARIBEL MIRANDA CAJNA; GERARDO ESPINOZA RODRIGUEZ AND MARIA SALAZAR BALTODANO; EDWIN CORRALES ROJAS AND VIRGITA HERNANDEZ ARGUEDAS; MANUEL SANCHEZ SEGURA AND ALEIDE GONZALEZ MORERA; VICTOR JULIO RODRIGUEZ VASQUEZ; DOMINGO CASTRO ALFARO; ISMAIL CAMPOS ALPIZAR AND DEYANIRA CORDERO ALVARADO; OVIDIO MORERA ALVARADO AND FLORINDA ROJAS DURAN; ALVARO MORERA ALVAREZ AND JEREMY MORERA LOPEZ; JESUS HERNANDEZ BADILLA AND ELIDIETH ROMAN AZOFEIFA; EDWIN LEON BARBOZA; EFRAIM HERRA BARBOZA; WALDEMAR LOAIZA CALVO; EDURADO PEREZ CAMPOS AND LUZ MARINA CAMPOS RODRIGUEZ; CLAUDIO SALAZAR CARBALLO AND DELFINA ALMANZA PEREZ; JORGE VAZQUEZ CARRILLO AND NOEMY SALINAS SALINAAS; EFRAIN NUNEZ CASTRO; JOEL DINARTE CASTRO; JORGE CASTRO CASTRO AND NURY BARBOZA MORA; SERGIO ZAMORA CASTRO AND CLARA MARIA CHAVEZ VARGAS; ALCIBIADES NUNEZ CESPEDES AND MARIA ESTER MONTERO BOGANTES; MIGUEL ANGEL STELLER CHAVES AND MARIA DEL SOCORRO SANCHEZ OSES; DIDIER ARIAS ELIZONDO AND IRENE BARRERA CHAVARRIA; GREGORIA PEREZ ESPINOZA AND TERESA SANCHEZ ADOLIO; SIGIFREDO MORALES ESPINOSA; FRANCISCO ARIAS FALLAS AND MARITZA GOMEZ PEREZ; RIGOBERTO GARITA GARITA AND MARIA CRISTINA CRUZ MARTINEZ; MANUEL GOMEZ GOMEZ AND DEYANIRA EN-

RIQUEZ QUEVARA; ANGEL SOLANO GONZALES AND LUZ RODRIGUES RAMIREZ; FRANCISCO MORERA GONZALEZ AND ELOISA RAMIREZ CAMPOS; MARCIANO SOLANO GONZALEZ AND FLORA ELENA FERNANDEZ ROBLES; ANDRES VEGA GRANADOS AND MARTA JIMENEZ GONZALES; ALFREDO BERMUDEZ HERNANDEZ AND MARIA LUISA BERMUDEZ ORDONEZ; JUAN FIGUEROA MATARRITA AND MIREYA PEREZ PEREIRA; URIEL NUNEZ MOYA AND MIRIAM CARTIN ARAYA; ELI ORDONEZ MURILLO AND NATIVIDAD ROBLES DURATES; ISMAEL SALAS NUNEZ AND BASELISA MEDINA MATARRITA; ANTONIO VILLALOBOS ORTIZ AND MARITZA SOSSA SOSSA; JORGE VEGA PEREZ; CARLOS LUIS MUNOZ RAMIREZ; FRANCISCO RAMIREZ RAMIREZ AND XINIA VINDAS CASTILLO; VICENTE GUEVARA REYES AND MARIA CECILIA DURAN CORRALES; GERARDO ESPINOZA RODRIGUEZ; DANIEL ZUMBADO SALAS AND LEDA MARIA ROSALES ROSALES; MARIO ZUMBADO SALAS AND ORLENDIA CASCANTE NAVARRO; RUBEN MORALES SALAZAR AND BLANCA NIEVES ARIAS QUESADA; ABELINO ROJAS SEQUEIRA; JOSE OBANDO SEQUEIRA AND JUDITH CAMPOS GONZALEZ; JOSE SIBAJA SOTA AND BLANCA NIEVES CASCANTE NAVARRO; ELEI ELIZONDO UMANA AND ROSALIA SOLANO GONZALEZ; JUAN ELIZONDO UMANA; ARNOLDO GALLO VALLEJOS; and MANUEL FLORES VALVERDE, demand judgment against the Defendants, and each of them, jointly and severally, for general and special damages and punitive damages, for their costs expended herein, and for

interest on said judgment from the date thereof until paid, at the legal rate, and for such other and further relief, both at law and in equity, to which the Plaintiffs may show themselves justly entitled.

Respectfully submitted,

BARON & BUDD
A Professional Corporation
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75225
214/369-3605

By: /s/ CHARLES S. SIEGEL
Charles S. Siegel

AND

LOUIS S. ROBLES, ESQ.
Attorney at Law
75 S.W. 8th Street, Suite 401
Miami, Florida 33130
305/371-5944

By: /s/ LOUIS S. ROBLES
Louis S. Robles

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 87-0457-Civ-Atkins

PERFECTO BARRANTES CABALCETA, et al.,
Plaintiffs,

v.

STANDARD FRIUT COMPANY, et al.,
Defendants.

(Filed July 21, 1987)

ORDER ON MOTION TO REMAND,
MOTION TO DISMISS,
AND RELATED MOTIONS

This cause is before the court on plaintiffs' Motion to Remand, and defendants' Motions to Dismiss for *Forum Non Conveniens*, Lack of Service of Process, Lack of Jurisdiction Over the Person, for Fraudulent Joinder, and More Definite Statement. The court has considered the pleadings submitted in this matter, the relevant law, and has heard oral argument. It is thereupon

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion to Remand is DENIED.

The court finds that removal was proper pursuant to 28 U.S.C., section 1441(b), on the ground that none of the parties is a citizen of Florida and that diversity of citizenship is present.

I. *Principal Place of Business of Standard Fruit Company and Standard Fruit and Steamship Company*

The court's main inquiry in this case concerns whether the principal place of business of any of the defendants is Florida. If so, removal would have been improper pursuant to the "no local citizen" limitation of the removal statute, 28 U.S.C., section 1441(b), which provides:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

A corporation is deemed to be a citizen of both the state of incorporation and the state of its principal of business for diversity purposes. 28 U.S.C., section 1332(c). To determine the principal place of business of a corporate party, the court must apply the "total activity" test. *Vareka Investments, N.V. v. American Investment Properties, Inc.*, 724 F.2d 907 (11th Cir. 1984). The test actually incorporates two tests: the nerve center test, which focuses on the locus of managerial and policymaking functions in the corporation, and the place of activities test, which focuses on the locus of production or sales activities. *Id.* at 910.

The two tests are applied in different factual situations. The nerve center test is applied to determine the prin-

cipal place of a corporation whose activities are scattered among several different states. *See Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959). The place of activities test is applied to determine the principal place of business of a corporation whose activities are basically bifurcated between two different states. *Homestead Log Co. v. Square D Co.*, 555 F. Supp. 1056 (D. Idaho 1983). Thus, the principal place of business of a corporation with significant administrative authority and activity in one state and lesser executive offices but principal operations in another state has been held to be the latter state, *Kelly v. U.S. Steel Corp.*, 284 F.2d 850 (3d Cir. 1960), and the principal place of business of a corporation with its corporate headquarters in one state and its single activity in another will generally be in the state of its operations, *Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970). As applied, therefore, the two tests have been found to be not only reconcilable, *see Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 n. 6 (5th Cir. 1980), but complementary, *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 410 (5th Cir. 1987).

The court finds the place of activities test to be the appropriate one for determining the principal place of business of Standard Fruit Company ("Standard Fruit"). Its operations occur in Ecuador, Honduras, and Costa Rica, and its executive and administrative functions occur in California and Florida. For purposes of determining diversity of citizenship, all aliens, whatever their nationality, are deemed to be citizens of the same jurisdiction. *K & H Business Consultants, Ltd. v. Cheltonian, Ltd.*, 567 F. Supp. 420 (D.N.J. 1983). In the

court's view, this rule is equally applicable to determining a corporation's principal place of business. This determination underlies that of corporate citizenship for purposes of diversity jurisdiction, and, in cases not presenting a federal question, removal jurisdiction. Thus, the fact that all of Standard Fruit's operations occur in alien jurisdictions is the controlling characteristic, and, for purposes of the place of activities test, the court concludes that Standard Fruit's operations occur in one jurisdiction. Although certain of its executive and administrative functions occur in two states in the United States, this fact does not support a conclusion that Standard Fruit's activities, including operations and management, are *scattered* throughout several jurisdictions within the meaning of the nerve center test. Rather, its activities are distinctly, though not equally, divided among three different jurisdictions, with its operations occurring solely in one of them.

Application of the place of activities test leads the court to the conclusion that Sandard Fruit's principal place of business is Latin America, not Florida, and that therefore its presence in the litigation does not contravene that no local citizen limitation in the removal statute. Standard Fruit is in the business of growing and exporting bananas in Costa Rica, Honduras, and Ecuador. All of its employees are in those three countries. Affidavit of Patrick Nelson at 16. Its day to day operational and management decisions are made at these places of operation. *Id.* at 35, 48-49. None of its operational activities take place in the United States.

The court need not reach the issue of whether Standard Fruit is actually a citizen of any of the Latin American countries in which its operations are centered, nor must

it address the possibility of corporate dual citizenship. *See Willems v. Barclays Bank, D.C.O.*, 263 F. Supp. 774 (S.D.N.Y. 1966). The removal issue as it pertains to Standard Fruit can be resolved on the basis of the court's finding that Standard Fruit's principal place of business is not Florida. *Accord Steinbock-Sinclair v. Amoco Int'l. Oil Co.*, 401 F. Supp. 19 (N.D. Ill. 1975).

The court further finds that Standard Fruit & Steamship Company's ("Standard Steamship") principal place of business is California by applying the nerve center test. The nerve center test is most appropriate in regard to Standard Steamship because its activities are scattered over six states. Its executive, administrative, and managerial activities take place in California, Mississippi, and Florida, and its operations occur in Delaware, New York, California, Mississippi, and Texas. On the record presented, Standard Steamship is neither an alien nor a Florida citizen such that removal would have been improper due to its presence in this litigation.

Standard Steamship has no employees in Florida, nor does its own assets or make sales in Florida. Its ties to Florida appear to be through the Dole Fresh Fruit Company. (It is not disputed that Dole's principal place of business is Florida.) Two of Standard Steamship's vice-presidents reside in Boca Raton and are also officers of Dole Fresh Fruit Company. It apparently has a logistics department in Boca Raton, which plaintiffs assert is responsible for the coordination of banana shipments. However, the record is lacking in any details as to what the logistics department actually does, and plaintiffs' conclusion is contradicted by evidence that the shipments are supervised from the terminals in Mississippi and four other states. In addition, this department is not staffed

by employees of Standard Steamship, but rather its administration is procured from Dole employees.

Standard Steamship's operations and employees are located outside of Florida. It receives fruit from Latin America at five terminals, located in Delaware, New York, California, Mississippi, and Texas. The terminal operations are overseen by a Standard Steamship employee at the Mississippi terminal.

Standard Steamship's directors reside in California. The Board of Directors meets there. Its president and two vice-presidents live there. Its corporate headquarters are in Los Angeles, where corporate books and records are prepared and maintained. tax returns are generated and filed, and corporate policy is determined. Affidavit of Patrick Nielson at par. 13.

On this record, the court finds that the locus of managerial and policymaking functions of Standard Steamship, that is, its nerve center, would be California. Its president, many of its officers, and directors reside there, one of its terminals is there, and, although its operations and managerial activities are scattered among five other states, its executive and policymaking activities appear to be centered at its corporate headquarters in California. Its activities in Florida, as in the other three states involved, are minimal compared to its activities in California. Thus, Standard Steamship is neither an alien nor a Florida citizen such that removal would be improper due to its presence.

II. *Fraudulent Joinder of Dole Fresh Fruit Company*

It is not disputed that Dole Fresh Fruit Company ("Dole") is a citizen of Florida. However, defendants

contend that Dole is fraudulently joined, and that, therefore, it must be ignored for purposes of determining removability. *Morris v. E.I. DuPont de Nemours & Co.*, 68 F.2d 788 (8th Cir. 1934); *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962).

The test for fraudulent joinder requires the removing party to show that there is no possibility that the plaintiff would be able to establish a cause of action against the resident defendant in state court. *Coker v. Amoco Oil Co.* 709 F.2d 1433, 1440 (11th Cir. 1983). That is, there must be no reasonable basis in fact or colorable ground supporting the claim against the joined defendant. *Goldberg v. CPC Int'l, Inc.*, 495 F. Supp. 233 (N.D. Cal. 1980). This determination must be based upon the plaintiff's pleading at the time of the petition for removal. *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *Coker*, 709 F.2d at 1440.

By applying these principles, the court finds that Dole has been fraudulently joined. Plaintiffs argue that Dole is a proper defendant in that it is the alter ego of, or has assumed liability for, Standard Fruit. However, plaintiffs' pleading at the time of the petition for removal is wholly lacking in legal and factual allegations to the effect that Dole is the alter ego of, or has assumed the liabilities of Standard Fruit. These allegations must be made to establish a cause of action. *See e.g., Gross v. Cohen*, 58 So. 2d 703 (Fla. 1952); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984). In regard to Dole, plaintiffs have merely alleged that Dole, along with other defendants, was negligent in causing, and strictly liable for, their injuries.

Plaintiffs argue that they need only establish a mere possibility. However, they must establish at least a colorable ground for these claims, and the record does not provide one. Dole was not in existence at the time plaintiffs' sustained their injuries. Furthermore, although Standard Fruit procures administrative services from Dole, the mere procurement of these services does not support a colorable claim that the two constitute a single operation. *Comp. Dania Jai-Alai*, 450 So. 2d at 1121.

Based upon the foregoing analysis, it appears that removal was proper in this case. The presence of Standard Fruit and Standard Steamship do not contravene the no local citizen limitation, and Dole, though a citizen of Florida, was not properly joined in this litigation.

2. Defendants' Motion to Dismiss for *Forum Non Conveniens* is GRANTED.

Defendants describe this cause as representing "one of the most wideranging efforts at forum shopping in legal history." Brief in Support of Motion to Dismiss at 1. They point out that fifty-eight of the plaintiffs herein filed suit in the Circuit Court for Dade County, Florida, in 1983. That case was subsequently removed to the Southern District of Florida, which dismissed it on the basis of *forum non conveniens*. *Sibaja v. Dow Chemical Co.*, No. 83-1347-Civ-JLK. The Eleventh Circuit affirmed the order of dismissal. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 106 S. Ct. 347 (1985).

Defendants further note that plaintiffs from Rodrigo Esquival Aguilar to Victor Julio Rodriguez Vasquez

brought suit in Superior Court for Los Angeles County, California in 1985. That case was subsequently removed to the Central District of California, which dismissed it on the basis of *forum non conveniens* in 1986. *Aquilar v. Dow Chemical Co.*, No. 86-4753 JGD (Tx.). That case is currently on appeal to the Ninth Circuit.

Further still, defendants note that plaintiffs from Domingo Castro Alfaro to Manuel Flores Valverde filed suit in Harris County, Texas in 1984. That case was subsequently removed to federal court, and then remanded to state court. Motions to Dismiss on the basis of *forum non conveniens* are currently pending before the state court.

Defendants acknowledge that the remaining plaintiffs have not previously filed suit in the United States. They argue, however, that the three earlier cases and the one before this court have common threads, including that fact that all plaintiffs are residents of Costa Rica, all allege, or it has been established that, they worked on Standard Fruit banana plantations, and all or almost all of them have pursued or are pursuing workers compensation claims in Costa Rica.

Against this background, defendants argue four bases for dismissal. First, they argue that this court must take judicial notice of the district court's ruling in *Sibaja*, and particularly of the facts established therein. Second, they argue that the *Sibaja* decision constitutes *res judicata* as to the claims filed in this cause by plaintiffs who filed claims in Sibaja. Third, they argue that the plaintiffs in *Alfaro* and in the case before this court are collaterally estopped from bringing this action, in that the court must follow the same analysis applied in *Sibaja*. Finally,

they argue that the present action must be dismissed under the doctrine of *forum non conveniens*.

Plaintiffs stand on their Motion to Remand, and do not argue any specific grounds in opposition to this motion.

First, the court takes judicial notice of the *Sibaja* decision pursuant to Rule 201(d) of the Federal Rules of Evidence. In a well-reasoned order, the district court dismissed the cause on the ground of *forum non conveniens*. The court found that the controlling law was set forth in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In applying the factors set forth in *Piper Aircraft* and *Gilbert*, the Court held that the considerations overwhelmingly weighed in favor of dismissal. The court held that the private interests to be considered under *Gilbert* were hampered by the fact that the alleged injuries occurred in Costa Rica.

> All the plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida, and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action in Florida. And, as was the case in *Piper Aircraft*, the Plaintiffs have not offered any specific reasons showing the convenience of their choice.

Order of Dismissal at 4-5.

The court further reasoned that the public interest was not served by the choice of forum.

> It could not help but congest this Court's docket more than it would that of a Court at the situs of the injury simply because of the logistics of dealing with fifty-eight different Plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of *forum non conveniens. Piper Aircraft,* 102 S. Ct. at 263. It would require jurors to hear and decide a dispute that has no connection with this community. And finally, the Defendants have asserted that Costa Rica offers the Plaintiffs an alternative forum with an adequate remedy, an assertion which has not been rebutted by the Plaintiffs.

Order of Dismissal at 5.

Second, the court finds that the plaintiffs who filed claims in the *Sibaja* and *Aquilar* cases are barred by the doctrine of *res judicata* from bringing their claims in this action. The addition of new plaintiffs to a later complaint does not prevent application of *res judicata* to those plaintiffs who were parties to prior litigation. *See e.g. Sims v. Mack Trucks, Inc.*, 463 F. Supp. 1068 (E.D. Pa. 1979). Nor does that fact that the previous judgment was not entered on the merits, but rather on grounds of *forum non conveniens,* preclude application of *res judicata* in this instance. *See Pasteska v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977), in which the court held that a district court was bound by an earlier

forum non conveniens dismissal entered by another district court where identical objective criteria were relied upon by the appellants and identical material facts underlied the application of those criteria in each case.

Third, the court finds that the plaintiffs in *Alfaro* and in the case before this court are not collaterally estopped from litigating this issue in this court. Collateral estoppel is not generally applicable unless there exists either identity or privity between parties to the previous litigation and those involved in the new litigation. *See e.g., In re Gottheiner,* 703 F.2d 1136 (9th Cir. 1983). For privity between the parties to exist, there must be a substantial identity between them or a sufficient commonality of interests. *Id.* at 1139. Privity exists, for example, between a controlling shareholder in a corporation and the corporation, *Sparks Nugget, Inc. v. Commissioner,* 458 F.2d 631 (9th Cir. 1972), and between the successor in interest in property and the former owner, *In re Kors, Inc.*, 15 B.R. 444 (Bankr. D. Vt. 1981).

The court finds that the plaintiffs named in this lawsuit do not share a sufficient commonality of interests or substantial identity such that litigation affecting the rights of those who were parties in the *Sibaja* action is necessarily conclusive as to the rights of the new parties named in the instant action. Although the individual plaintiffs named in this action sustained their injuries in the same circumstances as those involved in the other actions, their interests derive from their own personal circumstances and injuries. On this basis, the court finds no privity between the parties in this case.

Finally, the court finds that, as to the *Alfaro* plaintiffs and the new plaintiffs named in the instant action, the

doctrine of *forum non conveniens* requires dismissal of this action for the same reasons cited by the district court in *Sibaja*. Defendants point out several determinative factors in the Motion to Dismiss.

a. Each individual plaintiff was allegedly exposed to the products complained of in Costa Rica.

b. Each individual plaintiff is a citizen and resident of Costa Rica.

c. The evidence and witnesses pertaining to the vendors and purchasers, employers, supervisors, physicians, hospital personnel, families, Costa Rican government officials, and documentary evidence are primarily located in Costa Rica.

d. Where such witnesses are available voluntarily, the cost of arranging for appearances in the Southern District of Florida would be substantial, if not prohibitive.

e. Most of the evidence and witnesses are not subject to the compulsory process of this court.

f. The witnesses and evidence available in the United States are primarily in places other than the Southern District of Florida, and so would not be more conveniently obtained in Miami than in Costa Rica or other places in this country.

g. The cause of action will be governed by Costa Rican law, with which Costa Rican courts have far greater familiarity.

h. The public interest is outweighed by the congestion of the court's docket and burdens upon local citizens serving as jurors.

i. The Costa Rican judicial system provides a forum and a remedy to the plaintiffs in the form of compensatory damages.

j. The defendants are subject to, or will submit to the jurisdiction of the Costa Rican judicial system.

k. Claims against other distributors and manufacturers not named in the suit, and third party claims for contribution can only be asserted through process issued and served in Costa Rica.

These factors are identical to those involved in the *Sibaja* case. The court finds that the private interests of the plaintiffs are similarly hampered by the Costa Rica situs in this case, and that the public interest is not served by plaintiffs choice of forum. As to the three new defendants in this action, Standard Fruit, Standard Steamship, and Dole, the court finds that their presence does not render this forum any more convenient than in the previous actions. As noted by defendants, the witnesses and evidence available in the United States are primarily located in places other than the Southern District of Florida. Neither Standard Fruit nor Standard Steamship have their principal places of business in Florida, or a substantial presence in Florida. Dole's relation to the case has not been demonstrated by plaintiffs, and therefore its presence in Florida would not contribute to the convenience of this forum.

For the foregoing reasons, the court finds that the doctrines of *res judicata* and *forum non conveniens* warrant dismissal of this action.

3. Defendants' Motion to Dismiss for Fraudulent Joinder is GRANTED for the reasons set forth in that

portion of this Order denying plaintiffs' Motion to Remand.

4. Defendants' Motion to Dismiss for Lack of Service of Process, Lack of Jurisdiction Over the Person, and for More Definite Statement are *DENIED* as moot in light of that portion of this Order dismissing this cause for *forum non conveniens.*

DONE AND ORDERED at Miami, Florida, this 21st day of July, 1987.

/s/ CLYDE ATKINS
United States District Judge

cc: James E. Wilber, Esq.
Charles S. Siegel, Esq.
R. Burton Ballanfant, Esq.
Sheryll Martens Dunaj, Esq.
Gennaro A. Filice, III, Esq.
Louis S. Robles, Esq.

Supreme Court, U.S.
FILED
FEB 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICK KAM CHOO, et al.,

Petitioners,

—vs.—

EXXON CORPORATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF INTERNATIONAL CHAMBER OF SHIPPING, IN SUPPORT OF RESPONDENTS EXXON CORPORATION, ET AL.

JOHN R. GERAGHTY
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

JOHN P. JAMES
ANDREW V. BUCHSBAUM
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980
Of Counsel

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT..... I-III

INTEREST OF AMICUS CURIAE..... 3

ARGUMENT..... 3

I. UNIFORM APPLICATION OF THE JONES ACT AND GENERAL MARITIME LAW MANDATES THAT STATE AND FEDERAL COURTS APPLY FEDERAL PRINCIPLES FORUM NON CONVENIENS..... 3

A. Forum Non Conveniens Is An Equitable Defense Having Its Roots In Admiralty Law... 3

B. A Maritime Doctrine Of Modified Forum Non Conveniens Generally Was Applied In Jones Act Claims Prior To This Court's Reyno Decision.. 4

C. There Is A Conflict Among The Circuits As To Whether The Maritime Modified Forum Non Conveniens Doctrine Is Consistent With Reyno..... 8

D. The Need For Uniform Application Of A State's Doctrine Of Forum Non Conveniens By The State And Federal Courts Within The State Is Superceded By The Need For Uniform Application Of The Maritime Doctrine Of Forum Non Conveniens Throughout The United States..... 10

TABLE OF CONTENTS--Continued

		Page
II.	EQUITY PRECLUDES RELITIGATION OF ISSUES ALREADY DECIDED. PRECLUSION IS NECESSARY TO PRESERVE THE UNIFORMITY OF MARITIME LAW AND TO ASSURE THAT THIS NATION'S JUDICIAL RESOURCES ARE NOT BURDENED WITH MULTIPLS LAWSUITS ARISING OUT OF A SINGLE OCCURRENCE.....	27
III.	CONCLUSION.....	36

CASES CITED

	Page
Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), cert. denied, 429 U.S. 1098 (1977).....	6
Armadora Naval Dominicana, S.A. v. Garcia, 478, So. 2d 873, 877 (Fla. App. 1985).....	7,8
Cabalceta v. Standard Fruit Company, 667 F.Supp. 833 (S.D. Fla. 1987).....	34,36
Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir. 1983).....	33
Cox v. Chesapeake Ohio Railroad Company, 494 F.2d 349, 350 (6th Cir. 1974), cert. denied, 417 U.S. 977 (1974).....	23
Cruz v. Maritime Co. of Phillippines, 702 F.2d 47 (2nd Cir. 1983).....	9
DeMateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977), cert. denied, 435 U.S. 904 (1978).....	6,7
Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938).....	11

Page

Exxon Corp. v. Chick Kam Choo,
817 F.2d 307, 320 (5th Cir. 1987)..... 3

Fisher v. Agios Nicolaos V,
628 F.2d 308 (5th Cir. 1980), cert. denied, 454 U.S. 816 (1981)..... 6

Garrett v. Moore-McCormack Co.,
317 U.S. 239 (1942)..... 15,16

Gulf Oil Corporation v. Gilbert,
330 U.S. 501 (1947)..... 3,4,5,33

Hanna v. Plumer,
380 U.S. 460 (1965)..... 18,19

Hellenic Lines, Ltd., v. Rhoditis,
398 U.S. 306 (1970)..... 13,33

In re Air Crash Disaster Near New Orleans, Louisiana,
821 F.2d 1147 (5th Cir. 1987)..... 5,8,9,23,24

Kassapas v. Arkon Shipping Agency, Inc.,
578 F.Supp. 400 (S.D.N.Y. 1984), affd mem. 738 F.2d 418 (2d Cir. 1987); 485 So.2d 565 (La. App. 5th Cir. 1986), writ denied, 48 So.2d 208 (La. 1986)..... 21

Klaxon v. Stentor Electric Manufacturing Co.
313 U.S. 487 (1941)..... 12,13

Page

Knickerbocker Ice Company v. Stewart,
253 U.S. 149, 160 (1920)..... 25

Kossick v. United Fruit Co.,
365 U.S. 731, 739..... 26

Lambiris v. Neptune Maritime Co.,
38 A.D.2d 528 (N.Y.A.D. 1971)..... 7,13

Lauritzen v. Larsen,
345 U.S. 571 (1953)..... 10,23,33

The Lottawanna,
21 Law 558, 575, 22 L ed 654, 662 (1875)..... 25

Miller v. Phillips Petroleum Co. of Norway,
529 A.2d 263 (Del. S.Ct. 1987)..... 7

Missouri Ex. rel. Southern Ry Co. v. Mayfield,
340 U.S. 1 (1950)..... 22

Mizakami Bros. of Arizona v. Mobay Chemical Corp.,
660 F.2d 712, 715 (8th Cir. 1981)..... 34

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618 (1978)..... 30

Moragne v. United States Marine Lines,
398 U.S. 375, 401 (1970)..... 25

Page

Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481 (10th Cir. 1983)..... 7,9,10

New York Central R.R. Co. v. Chisholm, 268 U.S. 29, 31 (1925)..... 23

Off-Shore Logistics, Inc. v. Tallentire, 477 U.S. 207 91 L.2d 174 (1986).... 17,30

Parsons v. Chesapeake & Ohio Railway Co., 375 U.S. 71 (1963)..... 28

Pate v. Standard Dredging, 193 F.2d 498, 500 (5th Cir. 1952).. 20

Pastewka v. Texaco, Inc., 565 F.2d 851 (3d Cir. 1977)..... 28,34,36

Pereira v. Utah Transport, Inc., 764 F.2d 686 (9th Cir. 1985)..... 7,9,10

Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981)..... 4,5,8,10

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)..... 14,15,20

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)..... 10,11,13,33

Page

Sanchez v. Caribbean Carriers Ltd., 552 F.2d ____ (2d Cir.), cert. denied, 434 U.S. 853 (1977)..... 28,34,36

Sibaja v. Dow Chemical Company, 757 F.2d 1215 (11th Cir.) cert. denied, ___ U.S. __, 88 L ed 2d 294 (1985)..... 23,24

Sigalis v. Lido Maritime Co. - M/V ROYAL ODYSSEY 776 F.2d 1512 (10th Cir. 1983)... 7

Sosa v. M/V Lago Izabal, 736 F.2d 1028 (5th Cir. 1984)..... 32

Szumlicz v. Norwegian America Line, Inc., 698 F.2d 1192 (11th Cir. 1983).... 7,9,10

Villar v. Crowley Maritime Co., 782 F.2d 1478 (9th Cir. 1986)..... 7

STATUTES

28 U.S.C. § 1445(a)..... 20

Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq..... 22

Death on the High Seas Act, 46 U.S.C. §§ 761, 764..... 29

Texas Wrongful Death Statute

Page

OTHER AUTHORITIES

1B Moore's Federal Practice, § 0.415..... 33

G. Gilmore & C. Black, The Law of Admiralty (2d Ed. 1975)..31

SUMMARY OF ARGUMENT

A. Forum non conveniens is an equitable doctrine which has its roots in admiralty cases. The doctrine provides defendants a right to object to the plaintiff's choice of a proper but severely inconvenient forum. Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

B. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) requires a federal court sitting in diversity to apply the forum state's substantive law to avoid disturbing equal administration of justice and to avoid forum-shopping within the state.

C. The so-called "reverse-Erie" doctrine requires state courts exercising maritime jurisdiction to apply maritime substantive law. Off-Shore Logistics Inc. v. Tallentire, 477 U.S. 207 (1986).

D. The "reverse-Erie" doctrine clearly manifests a national policy that uniform application of maritime law, equal administration of justice and avoidance of forum-shopping in maritime law are paramount to an individual state's interest in equal administration of justice, uniformity and avoidance of forum-shopping within the state. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Hanna v. Plumer, 380 U.S. 460 (1965).

E. If states implement local "open forum" policies in foreign disputes arising under maritime law, maritime defendants will be deprived of a traditional, equitable right to seek relief proscribing litigation in an inconvenient forum which has no relationship with a foreign dispute. Foreign defendants would often be denied access to a convenient venue in Jones Act cases,

which cannot be removed to the federal courts. Pate v. Standard Dredging, 193 F.2d 498 (5th Cir. 1952).

F. This Court should require all state and federal courts to apply federal maritime forum non conveniens standards in Jones Act and maritime cases, and this Court should affirm the judgment below enjoining the plaintiff from commencing another action to recover damages arising our of the identical occurrence here in dispute. Pastewka v. Texaco, Inc., 565 F.2d 851 (3d Cir. 1977).

International Chamber of Shipping ("the Association"), and its respective members, respectfully submit a brief amicus curiae, in support of Respondents herein, on consent of all parties pursuant to Rule 36.2. The consent of Petitioners is evidenced by their letter to counsel for the Association dated February 9, 1988, and the consent of Respondents by their letter to counsel for the Association dated February 12, 1988; the originals of these letters have been submitted to the Clerk for filing with this Brief.

INTEREST OF AMICUS CURIAE

The Association is an organization of national shipowners' associations. The Association's members represent approximately two-thirds of the free world's ocean-going vessel tonnage, flying the flags of numerous maritime countries. The vessels owned and operated by the members of the Association

provide regular employment for hundreds of thousands of seafarers throughout the world. A substantial number of vessels owned or operated by members of the Association call at ports of the United States. The Association and its respective members are therefore materially affected by the issues before the Court on this appeal, inasmuch as the lack of uniform application of the doctrine of forum non conveniens in the United States subjects them to disparate treatment depending solely upon the whim of a litigant in the selection of the United States forum in which to proceed. In the Association's view, such circumstances contravene the needs of international maritime commerce for uniformity in the application of the laws of the maritime countries of the world and frustrate reasonable expectations of certainty in the law.

I.

UNIFORM APPLICATION OF THE JONES ACT AND GENERAL MAPITIME LAW MANDATES THAT STATE AND FEDERAL COURTS APPLY FEDERAL PRINCIPLES OF FORUM NON CONVENIENS

A. Forum non conveniens is an equitable defense having its roots in admiralty law.

As noted by the court below, "forum non conveniens is a 'characteristic feature' of maritime law. The doctrine has its roots in the maritime law . . . ." Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 320 (5th Cir. 1987).

The doctrine prevents a plaintiff from choosing a technically proper, but inconvenient, forum to "vex, harrass or oppress" the defendant by inflicting upon him expenses or trouble not necessary to plaintiff's own right to pursue his remedy. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Gulf Oil is the landmark case which extended this equitable doctrine into actions at

law. Two dissenting justices in Gulf Oil asserted that the expansion of the doctrine from admiralty and equity into actions at law was inappropriate, arguing that dismissals on the grounds of inconvenient forum should be limited to admiralty and equity cases "[f]or reasons peculiar to the special problems of admiralty and the extraordinary remedies of equity . . . . This exception is rooted in the kind of relief which these courts grant and the kinds of problems which they solve. [C]ourts of Admiralty . . . act upon enlarged principles of equity." Gulf Oil, supra, 330 U.S. at 513-514 (citations omitted).

B. A maritime doctrine of modified forum non conveniens generally was applied in Jones Act claims prior to this Court's Reyno decision.

Prior to this Court's decision in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), it was generally accepted in the lower

courts that maritime law required a special "modified analysis on forum non conveniens issues" in cases asserting claims under the Jones Act and general maritime law. See In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1163, n.25 (5th Cir. 1987) (en banc).

One factor traditionally considered in determining if a court should exercise its discretion to dismiss an action on the grounds of forum non conveniens is whether or not the forum court would be constrained to determine and apply foreign law. See Gulf Oil, supra, 330 U.S. at 509; Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 n.29 (1981).

In the so called "modified analysis" of forum non conveniens principles in Jones Act and general maritime law cases, the determination of applicable law was considered pivotal; if American law applied, the courts

had no discretion to dismiss a suit based on the Jones Act or the general maritime law of the United States. It was reasoned that "[w]hen a foreign seaman has a cause of action based on the laws of the United States, the seaman comes by right into the courts and the retention of his suit based on domestic law should be mandatory. Retention of the suit is not discretionary, because once the scope of United States law has been defined the judiciary is not free to adjudicate selectively the effects of the law." Fisher v. Agios Nicolaos V, 628 F.2d 308, 315, n.11 (5th Cir. 1980), cert. denied, 454 U.S.816 (1981), quoting Comment, A New Look at Lauritzen v. Larsen, Choice of Law and Forum Non Conveniens, 38 La.L. rev. 957, 958 (1978). See also, Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), cert. denied, 429 U.S. 1098 (1977); DeMateos v. Texaco,

Inc., 562 F.2d 895 (3d Cir. 1977), cert. denied, 435 U.S. 904 (1978); Szumlicz v. Norwegian America Line, Inc., 698 F.2d 1192, 1195 (11th Cir. 1983); Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481, 1483 (10th Cir. 1983); Sigalis v. Lido Maritime Co. - M/V ROYAL ODYSSEY, 776 F.2d 1512 (10th Cir. 1983); Pereira v. Utah Transport, Inc., 764 F.2d 686, 688 (9th Cir. 1985); Villar v. Crowley Maritime Co., 782 F.2d 1478, 1479 (9th Cir. 1986).

At least three state court cases have interpreted the federal decisions as authority for barring dismissal by state courts on the grounds of forum non conveniens if the Jones Act is applicable. See Lambiris v. Neptune Maritime Co., 38 A.D.2d 528, 529; 326 N.Y.S.2d 862, 863-64 (N.Y.A.D. 1971); Miller v. Phillips Petroleum Co. of Norway, 529 A.2d 263, 270 (Del. Super. 1987); Armadora Naval Dominicana, S.A. v. Garcia, 478

So.2d 873, 877 (Fla. App. 1985).

C. There is a conflict among the circuits as to whether the maritime modified forum non conveniens doctrine is consistent with Reyno.

In Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), this Court provided an analysis of the doctrine of forum non conveniens applied in a diversity case. In Reyno, the Court ruled that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." 454 U.S. at 247.

Based on the Reyno case, supra, the United States Court of Appeals for the Fifth Circuit recently abandoned its "modified analysis" of forum non conveniens in Jones Act and general maritime law cases:

> We also can discern no overriding justification for refusing to apply Reyno's principles and this opinion's procedural rules to forum non conveniens issues in Jones Act and general maritime cases. We believe that a single and uniform approach to the analysis and application

> of the forum non conveniens doctrine best serves litigants and the courts. We, therefore, expressly disapprove of and overrule our Jones Act and general maritime caselaw that utilizes a modified forum non conveniens analysis. Henceforth, all cases, including Jones Act and maritime actions, are governed by the dictates of Reyno and this opinion (footnote omitted).

Air Crash Disaster, supra, 821 F.2d at 1164, n.25; accord, Cruz v. Maritime Co. of Philippines, 702 F.2d 47, 48 (2d Cir. 1983).

The United States Courts of Appeals for the Ninth, Tenth and Eleventh Circuits, however, apparently still subscribe to the view that American courts have no discretion to dismiss a case if the Jones Act or the general maritime law of the United States applies. See Needham v. Phillips Petroleum Co. of Norway, supra, 719 F.2d at 1483; Szumlicz v. Norwegian American Line, Inc., supra, 698 F.2d at 1195; Pereira v. Utah Transport, Inc., supra, 764 F.2d at 688. Therefore, if the Ninth, Tenth and Eleventh Circuits are correct that a suit based on

the Jones Act and general maritime law cannot be dismissed if American law is applied, maritime choice of law concepts are the cornerstone of any forum non conveniens analysis in such cases. If the Second and Fifth Circuit Courts of Appeals are correct that this court's Reyno decision overrules the "modified analysis" in Jones Act and General Maritime Law cases, maritime choice of law principles nevertheless remain an integral and important part of a forum non conveniens analysis of both state and federal courts. See Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Needham, supra; Szumlicz, supra; Pereria, supra; Piper, supra, 454 U.S. at 260, n.29.

D. The need for uniform application of a state's doctrine of forum non conveniens by the state and federal courts within the state is superceded by the need for uniform application of the maritime doctrine of forum non conveniens throughout the United States.

We submit that principles of harmony and uniformity in maritime law should require the application of federal maritime law in both federal and state courts to determine if the balance of the forum non conveniens factors warrant dismissal of claims asserted under the Jones Act and general maritime law.

As noted supra, both state and federal courts are required to apply federal maritime choice of law principles to determine applicable law in Jones Act and general maritime law cases. See, e.g., Romero, supra, 358 U.S. at 389. This is a departure from the doctrine announced in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), which, if applicable, would require the federal courts to apply the forum state's choice of law principles. Erie held that federal courts sitting in diversity must apply the substantive law of the forum state to avoid

forum-shopping and to insure the uniformity of administration of justice within the state. In Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), this Court held that a federal court sitting in diversity must apply the choice of law rules of the forum state, stating:

> Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See Erie R. Co. v. Tompkins, supra, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. (Emphasis supplied)

Klaxon, supra, 313 U.S. at 496.

It is well settled, however, that in a case involving Jones Act and general mari-

time law claims, the state and federal courts both must apply federal choice of law principles. See Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970); Romero, supra, 358 U.S. at 389; Lambiris, supra, 38 A.D.2d at 529, 326 N.Y.S.2d at 864. Clearly, application of federal, rather than state, choice of law principles in Jones Act cases does "violence to the principle of uniformity within a state", Klaxon, supra, 313 U.S. at 496, in order to effectuate the paramount goal of uniformity in admiralty. If state courts, already constrained to apply federal maritime choice of law rules in Jones Act and general maritime cases, were also required to apply federal principles of forum non conveniens, the desired uniformity in admiralty would be obtained, i.e., forum shopping (such as has occurred in the case at bar) would be discouraged, and uniformity of administra-

tion of justice in determining the convenient forum for litigation of Jones Act and general maritime law cases would be assured.

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), made it clear that Erie's mandate for uniform application of a state's law by federal and state courts within the state is superceded by the need for uniform application of maritime law throughout the United States. In Hawn, supra, the defendant asserted that the federal court should apply Pennsylvania law to bar a maritime tort claim on the grounds of contributory negligence because plaintiff had invoked the federal court's diversity, rather than admiralty, jurisdiction. The Court nonetheless held that the maritime doctrine of comparative negligence applied because the basis of the action was ". . . a maritime tort, a type of action which the Constitution has placed under national power to

control in its substantive as well as its procedural features . . . ." Hawn, supra, 346 U.S. at 409 (citations and quotations omitted).

The Court declined to apply state law, stating:

> Thus we are asked to use the Erie-Tompkins Case to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of parties would depend on which courthouse, or even on which "side" of the same courthouse, a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the Erie-Tompkins doctrine. Of course, the substantial rights of an injured person are not to be determined differently whether his case is labelled "law side" or "admiralty side" on a district court's docket.

346 U.S. at 411 (emphasis added).

In Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), the state trial courts had held that the burden of proving the invalidity of a release was a procedural question under Erie and was therefore governed by state law which placed the burden of proof

on the seaman-releasor. This Court reversed, holding that the characterization of the burden of proof as "procedural" by the state courts did not mandate application of state law because the burden of proof to determine the validity of releases affects the substantive rights of parties rooted in maritime law. The Court characterized the question as follows:

> [H]aving voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give the petitioner the full benefit of federal law and if so whether it failed to afford that benefit.

317 U.S. at 243.

The Court continued:

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself orginates. * * * So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Garrett, supra, 317 U.S. at 245-46.

Based on Garrett, supra, and other precedents, this Court recently announced that state courts should follow a so-called "reverse-Erie" doctrine to determine if they should apply federal maritime standards in a maritime case.

In Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), 91 L.Ed.2d 174, this Court stated:

> [T]he "savings to suitors" clause allows states courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

91 L.Ed.2d at 190.

Hanna v. Plumer, 380 U.S. 460 (1965), is a leading decision of this Court which holds that "outcome determination", rather than strict reference to distinctions between substance and procedure, is the test for determing if the federal court should apply state law. While recognizing that the "broad command of Erie" to federal courts sitting in diversity was "to apply state substantive law and federal procedural law", 380 U.S. at 465, Hanna nonetheless further defined Erie's goals:

> Guaranty Trust Co. v. York, 326 US 99 . . . made it clear that Erie-type problems were not to be solved by reference to any traditional or commonsense substance-procedure distinction:
>
> And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

380 U.S. at 465-66 (citations omitted).

Hanna, supra, cautioned, however, that:

> The "outcome-determination" test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of an inequitable administration of the laws.

380 U.S. at 468 (emphasis added).

Applying "reverse-Erie" standards to the "Erie" principles espoused in Hanna, supra, provides further support for compelling state courts to apply federal maritime forum non conveniens standards in Jones Act and general maritime cases:

1. failure to enforce the federal forum non conveniens rule will result in inequitable administration of the laws, because state courts will be empowered to arbitrarily vitiate defendants' traditional right in admiralty to challenge plaintiff's choice of an inconvenient forum. This is especially so in Jones Act cases because they cannot be removed to the Federal courts where the defense of forum non con-

veniens is available. See 28 U.S.C. § 1445(a); Pate v. Standard Dredging, 193 F.2d 498, 500 (5th Cir. 1952). As stated by the Court in Hawn, supra:

> [T]he substantial rights of parties would depend on which courthouse ... a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the Erie-Tompkins doctrine.

Hawn, supra, 346 U.S. at 411.

2. Application of the state law of forum non conveniens in "open forum" states like Louisiana, and perhaps Texas, would obviously encourage forum-shopping by foreign seamen and their representatives. This will promote disunity and unpredictability into the application of maritime law in the United States. Without the restraints of forum non conveniens, foreign plaintiffs will be encouraged to import foreign controversies which have no national (or local) interest if the plaintiffs devise some

means of obtaining jurisdiction over a foreign defendant. The case at bar is a classic example. See also Kassapas v. Arkon Shipping Agency, Inc., 578 F.Supp. 400 (S.D.N.Y. 1984), affd mem. 738 F.2d 418 (2d Cir. 1987); 485 So.2d 565 (La.App. 5th Cir. (1986), writ denied, 48 So.2d 208 (La. 1986). In Kassapas, supra, the foreign plaintiffs alleged causes of action based on the Jones Act and general maritime law of the United States resulting from the deaths of two Greek seamen in the navigable waters of Russia while they were employed aboard a foreign-flag vessel owned by a foreign defendant. The United States District Court for the Southern District of New York dismissed the case on the grounds of forum non conveniens. Kassapas, supra, 578 F.Supp. 400. A dismissal was affirmed by the United States Court of Appeals for the Second Circuit. Kassapas, supra, 738

F.2d 418. Thereafter, the vessel fortuitously happened to call in the State of Louisiana, where the plaintiffs attached her and commenced an action in the Louisiana state court. Defendant moved to dismiss on the basis of res judicata or, in the alternative, on the basis of forum non conveniens and the motion was denied because Louisiana has an "open forum" policy which does not recognize dismissals on the grounds of forum non conveniens. This type of blatant forum-shopping is an abuse of the American judicial system which should not be tolerated. If state courts are required to apply uniform federal maritime principles of forum non conveniens, this abuse will be eliminated.

In Missouri Ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950), this Court held that forum non conveniens was a "procedural" doctrine and that state courts were free to determine their own principles

of forum non conveniens in Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. ("FELA") cases. However, the Missouri case should provide little guidance, because it is well settled that the FELA has no extraterritorial application and has no bearing on sensitive areas of international law. See New York Central Railroad Co. v. Chisholm, 268 U.S. 29, 31 (1925); Lauritzen v. Larsen, supra, 345 U.S. at 581; Cox v. Chesapeake Ohio Railroad Company, 494 F.2d 349, 350 (6th Cir. 1974), cert. denied, 417 U.S. 977 (1974).

Two recent Courts of Appeals decisions have determined that federal courts sitting in diversity should apply federal principles of forum non conveniens. Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir.) cert. denied, 474 U.S. 948 (1985); In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc).

In the instant matter, the court below

held that applying a "reverse Erie" test to determine if a state court is bound to apply federal maritime principles of forum non conveniens does not result in a "reverse" answer, which mandates application of state law pertaining to forum non conveniens in Jones Act cases.

Sibaja, supra, and In re Air Crash Disaster Near New Orleans, supra, involved diversity cases, where the foreign defendant, unlike in a Jones Act case, generally has the right to seek removal from the state to the federal court.

Removal to the federal court in a diversity case will preserve the foreign defendant's right to challenge the venue of the forum state. However, since Jones Act cases cannot be removed, and application of state law "open forum" principles will deprive defendants of their right to challenge the convenience of the venue.

More importantly, the need for uniform-

ity within the confines of any given state must give way to the "... constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' The Lottawanna, 21 Law 558, 575, 22 L ed 654, 662 (1875)." Moragne v. United States Marine Lines, 398 U.S. 375, 401 (1970). See also Knickerbocker Ice Company v. Stewart, 253 U.S. 149, 160 (1920), where this Court stated:

> . . . The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

We respectfully submit that Texas and the other states of the United States have no local interest whatever in adjudicating foreign controversies commenced by foreign seamen or their representatives and that the arbitrary displacement of the defense of forum non conveniens so deeply rooted in maritime law would be an unwarranted intrusion by the states into international affairs. See Kossick v. United Fruit Co., 365 U.S. 731, 739:

> [M]aritime law is -- in a special sense at least, Romero v. International Terminal Operating Co. 358 US 354, 3 L ed 2d 368, 79 S Ct 468 -- federal law and therefore supreme by virtue of Article 6 of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.

We submit that there is no overlapping

state and federal concern in a case where a foreign seaman or his representative asserts a claim under foreign law to recover damages for a foreign tort. Accordingly, there is no state interest to accommodate, and the federal maritime interest in a uniform law of forum non conveniens should displace the local interest of any state in restricting, expanding or vitiating a defendant's right to assert a defense based on the federal doctrine of forum non conveniens.

II.

EQUITY PRECLUDES RELITIGATION OF ISSUES ALREADY DECIDED. PRECLUSION IS NECESSARY TO PRESERVE THE UNIFORMITY OF MARITIME LAW AND TO ASSURE THAT THIS NATION'S JUDICIAL RESOURCES ARE NOT BURDENED WITH MULTIPLE LAWSUITS ARISING OUT OF A SINGLE OCCURRENCE

Petitioner-plaintiff (hereinafter called "Mrs. Choo") argues in her brief that the district court below improperly enjoined prosecution of the state court action without determining if the state court would accept jurisdiction under its forum non

conveniens doctrine. Petitioner's brief at 12. However, as is demonstrated in Point I, supra, principles of uniformity in maritime law mandate that state and federal courts apply a uniform federal maritime forum non conveniens doctrine. Therefore, Texas law is irrelevant, because the issues to be decided in the state court are the identical federal maritime issues already determined by the district court. Thus, notwithstanding Texas law, principles of equitable preclusion prevent Mrs. Choo from relitigating the issues already decided by the district court below. See Sanchez v. Caribbean Carriers Ltd., 552 F.2d 70 (2d Cir.), cert. denied, 434 U.S. 953 (1977); Pastewka v. Texaco, Inc., 565 F.2d 851 (3d Cir. 1977). Cf. Parsons v. Chesapeake & Ohio Railway Co., 375 U.S. 71 (1963), where issue preclusion was denied because the two forums applied different forum non conveniens standards.

Mrs. Choo apparently does not dispute that her claims based on the Jones Act, general maritime law, and the Death on the High Seas Act (46 U.S.C. § 761, et seq.) ("DOHSA"), are barred by the district court's decision, because she has accepted dismissal of these claims from her second lawsuit commenced in the state court. Petitioner's brief at 4, n.1. Mrs. Choo claims, however, that her subsequent state court action alleges "new" claims allegedly based on the law of Singapore and on 46 U.S.C. § 764 of DOHSA. She also claims her alleged cause of action pursuant to the Texas wrongful death statute is still viable because it supposedly was not dismissed by the district court.

The district court dismissed Mrs. Choo's claims based on the Jones Act, DOHSA and the general maritime law of the United States. See decision below, 817 F.2d at 310, n.4.

Mrs. Choo apparently does not realize that, a fortiori, her alleged claims under the Texas Wrongful Death Statute were included in the dismissal, because state remedies for deaths on the high seas have been pre-empted by the DOHSA. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (197); Tallentire, supra, 477 U.S. 207 (1986).

Tallentire, supra, leaves open only the question of whether DOHSA "may be 'supplemented' by a recovery for the decedent's pain and suffering before death under the survival provision of some conceivable applicable state statute..." Id. 477 U.S. ____; 91 L.Ed.2d 184, n.1. However, even assuming arguendo the Texas survival statute supplements DOHSA, the claim based on the Texas statute obviously was part of the DOHSA claim that was dismissed.

Mrs. Choo's argument that she has asserted in the state court "new" claims

based on the law of Singapore and based on § 764 of DOHSA is equally misplaced. The argument reflects a misunderstanding of the distinction between choice of law concepts and concepts of forum non conveniens. Admiralty jurisdiction exists to determine claims based on American law or foreign law whenever injuries occur on navigable waters in connection with the navigation of a vessel. The district court held that Mrs. Choo had no claims based on DOHSA or the general maritime law of the United States, and that the laws of Singapore applied to Mrs. Choo's claims. Therefore, after dismissal of Mrs. Choo's claims under American law, the district court still had jurisdiction in admiralty to adjudicate Mrs. Choo's claims based on the laws of Singapore. See Gilmore and Black, The Law of Admiralty (2d ed. 1975), § 6-62, p. 469; §6-63, p. 473; Sosa v. M/V Lago Izabal, 736 F.2d

1028, 1031 (5th Cir. 1984). 46 U.S.C. § 464 provides an additional basis for district courts to take jurisdiction of causes of action for deaths on the high seas brought pursuant to foreign law, but Mrs. Choo's DOHSA claims were specifically dismissed. Therefore, after the court's dismissal of the claims based on the Jones Act, DOHSA and the United States general maritime law. Mrs. Choo's only remaining claims were in admiralty based on the law of Singapore. These were dismissed on the grounds of forum non conveniens.

Accordingly, it is clear that Mrs. Choo is not asserting any "new" claims in the state court action which have not already been adjudicated. Therefore, even assuming arguendo that a subsequent change in circumstances would warrant reconsideration of the decision below, no such change in circumstances has been alleged. See, e.g., 1B

Moore's Federal Practice, § 0.415; Sanchez, supra, 552 F.2d at 73.

In Chick Kam Choo v. Exxon Corp., 699 F.2d 693, 694 (5th Cir. 1983), the Fifth Circuit's decision reveals that the district court below correctly applied the applicable federal choice of law and forum non conveniens principles announced by this Court in Lauritzen, supra, Romero, supra, Rhoditis, supra, and Gulf Oil, supra. The Fifth Circuit quoted the district court's findings as follows:

> ...Singapore's would be the controlling law, Singapore was the site of the accident, was the residence of most of the plaintiffs and witnesses, and could provide an adequate forum. The magistrate further concluded that Exxon could not assert its contractual indemnity rights against the Singapore shipyard in a United States action, presumably because of a lack of personal jurisdiction over the shipyard.

699 F.2d at 693-95.

Issue preclusion prevents Mrs. Choo from relitigating these findings, which

clearly indicate Singapore, and not the United States, is the convenient forum for resolution of this dispute. As the court stated in Sanchez, supra, 552 F.2d at 72:

> It is clear from the facts in the present case that plaintiffs-appellants pressed the same claim, involving the same parties and arising out of the same circumstances, before the district court in New York as they did before the district court in Puerto Rico. The issue of subject matter jurisdiction as to the Jones Act claims was "actually litigated and determined by a valid and final judgment," and that determination having been essential to that judgment, appellants are precluded from raising the issue once again in the Southern District of New York. Restatement of Judgments 2d, § 68 (Tent.Draft No. 1 1973).

See also Pastewka, supra, 565 F.2d at 853; Mizakami Bros. of Arizona v. Mobay Chemical Corp., 660 F.2d 712, 715 (8th Cir. 1981); Cabalceta v. Standard Fruit Company, 667 F.Supp. 833 (S.D. Fla. 1987).

The district court below made specific findings which indicated that Singapore law applies to Mrs. Choo's claims and that the

public and private interests would best be served by litigating this controversy in Singapore. The only arguably significant issue relevant to determination of a forum non conveniens motion which the federal court did not decide is whether or not any congestion in the Texas state court would make its acceptance of jurisdiction over this foreign controversy even more undesirable. Where, as here, the public and private interests clearly warrant dismissal, we submit it would be an abuse of discretion for a court to deny a motion based on forum non conveniens solely because there is no congestion in the court.

In these circumstances, assertion of the doctrine of res judicata in each subsequent suit commenced by foreign plaintiffs, like Mrs. Choo, is an unsatisfactory resolution, because plaintiffs have unlimited capacity to relitigate in the hope of find-

ing a forum that will accept them.

We respectfully submit that the district court properly enjoined Mrs. Choo and her attorneys from prosecuting her claim in the state court. Accordingly, for the reasons stated in respondents' brief, we submit the injunction was clearly proper pursuant to 28 U.S.C. § 2283 "to protect or effectuate" the judgment of the federal court below. See Pastewka, supra; Sanchez, supra; Cabalceta, supra.

III.

CONCLUSION

The maritime law requires the Texas state court and the district below to consider identical federal maritime choice of law and forum non conveniens principles to determine Mrs. Choo's action was properly dismissed. The district below properly adjudicated all issues relevant to determin-

ation of the choice of law and forum non conveniens issues, and entered a final judgment dismissing her claims. Therefore, direct estoppel precludes Mrs. Choo from relitigating the dismissal of her case and the judgment of the district court below issuing an injunction in aid of its judgment should be affirmed.

Dated: February 20, 1988

Respectfully submitted,

JOHN R. GERAGHTY
Attorney for International
Chamber of Shipping in support
of Respondents Exxon
Corporation, et al.,
Amicus Curiae

John P. James
Andrew V. Buchsbaum
HEALY & BAILLIE

Of Counsel